

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

MOBILE
TELECOMMUNICATIONS
TECHNOLOGIES, LLC

DOCKET NO. 2:13CV947

JULY 22, 2015

VS.

9:00 A.M.

LG ELECTRONICS
MOBILECOMM U.S.A., INC.

MARSHALL, TEXAS

VOLUME 1 OF 1, PAGES 1 THROUGH 109

REPORTER'S TRANSCRIPT OF MOTION HEARING

BEFORE THE HONORABLE ROY S. PAYNE
UNITED STATES MAGISTRATE JUDGE

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1 (OPEN COURT, ALL PARTIES PRESENT.)

2 THE COURT: For the record, we're here for the
3 motion hearing in *Mobile Telecommunications Technology*
4 *versus LG Electronics MobileComm*, which is Case
5 No. 2:13-947 on our docket.

09:01AM

6 Would counsel state their appearances for the
7 record.

8 MR. DACUS: Good morning, your Honor. Deron
9 Dacus here with Dustin Taylor on behalf of MTel, your
10 Honor; and we are ready to proceed.

09:01AM

11 THE COURT: All right. Thank you, Mr. Dacus.

12 MR. GARDNER: Good morning, your Honor. Allen
13 Gardner. Here with me is Mr. Bill Barrow, Mr. Jamie
14 Beaber, and Mr. Kfir Levy; and we're here for the LGEMU
15 defendant. And we're ready to proceed, sir.

09:01AM

16 THE COURT: All right. Thank you,
17 Mr. Gardner.

18 I guess before I start I should ask counsel if
19 they have worked out anything on the various motions that
20 we have before us. Are there any agreements that should
21 be announced?

09:01AM

22 MR. GARDNER: Your Honor, Allen Gardner for
23 Defendant LG. Sir, concerning the request for *in camera*
24 inspection of documents, the parties have reached an
25 agreement that LGEMU would produce one copy of the

09:02AM

09:02AM

1 documents we requested that you review *in camera*. That
2 document does not -- the fact that we are producing it to
3 resolve this issue does not constitute in any way any
4 waiver of any work product, attorney-client, or any other
5 applicable privileges. They will only make one -- they
6 will only keep that one copy of it, and they will treat
7 it as source code.

09:02AM

8 THE COURT: All right. And, Mr. Gardner, just
9 so I understand, this is in connection with the court's
10 consideration of the Motion to Disqualify? Is that
11 right?

09:02AM

12 MR. GARDNER: Yes, sir, but it specifically
13 requests that -- our request that you, your Honor, review
14 the documents *in camera*.

15 THE COURT: Okay. Well, I intend to take that
16 motion up this morning. So, do you -- are you intending
17 to share the documents with the other side? Is that my
18 understanding of the agreement?

09:03AM

19 MR. GARDNER: Yes, sir. Yes, sir, we will
20 momentarily.

21 THE COURT: Okay. And, Mr. Dacus, you're in
22 agreement with that?

09:03AM

23 MR. DACUS: Yes, your Honor, we are in
24 agreement with that. Obviously we have not seen the
25 document, and I guess the only caveat is we might

09:03AM

1 reserve -- when the motion -- when the substantive motion
2 comes up, we might reserve potentially to ask the court
3 to file some sort of supplemental brief once we see the
4 document itself. But the agreement with respect to
5 disclosure of the document that Mr. Gardner disclosed is
6 in agreement.

09:03AM

7 THE COURT: Okay. I think what I'll do then
8 is ask if the defendant will provide me with a copy of
9 the documents and provide Mr. Dacus with a copy of the
10 documents now. We'll take a brief recess, and then we'll
11 come back and argue the motion.

12 MR. GARDNER: Yes, sir.

13 THE COURT: Okay. Anything else we need to
14 put on the record before we --

09:04AM

15 MR. GARDNER: No, sir. As long as I give them
16 to Mr. Chen. I just want to make sure.

17 THE COURT: That would be great. Do that.

18 (Recess, 9:04 a.m. to 9:30 a.m.)

09:30AM

19 THE COURT: All right. I would like to start
20 with the Motion to Disqualify and then move on to other
21 motions.

22 So, I guess that's defendant's motion, if you
23 want to speak to that.

09:31AM

24 MR. LEVY: Thank you, your Honor. Good
25 morning.

1 THE COURT: Good morning.

2 MR. LEVY: The Motion to Disqualify is fairly
3 straightforward, we think. Essentially what's happened
4 is there was an expert, Dr. Bims, who had been engaged
09:31AM 5 and worked for LGEMU, among other LG entities, in a
6 couple of ITC investigations. Those investigations
7 involved some of the same products at issue here. At
8 least one of them involved some of the same products at
9 issue here in this case and some of the same technology,
09:31AM 10 similar technology as well. That case ended. The
11 engagement agreement, you know, specifies, however, that
12 the confidential information should stay.

13 That expert was then subsequently hired by
14 MTel for this case and I believe for earlier cases as
09:31AM 15 well. That all happened -- MTel's first engagement of
16 Dr. Bims happened -- you know, in our papers we say 19
17 months before we filed. I'm trying to remember when they
18 were actually filed, but well over a year and a half ago.
19 It's probably getting close to two years now.

09:32AM 20 At some point -- at that point -- I mean, the
21 first thing you do when you hire an expert is you ask,
22 you know, "Have you ever done work for the opposing
23 party?" I have a hard time imagining they didn't ask.
24 I'm certain they did. And at that point it should have
09:32AM 25 been -- the first step they should have done after that

09:32AM

1 was, you know, "What sort of work did you do? What kind
2 of technology? Which products?" Let's make sure -- if
3 we really want to hire this guy, let's make sure there
4 isn't a conflict. Usually, frankly, when you hear that
5 the guy worked for the other side, you move on to the
6 next expert. But let's say you really want this guy for
7 some reason. You try to determine if there's a conflict.
8 I don't know whether that happened; but what I do know is
9 that just two weeks before the deadline for disclosures
10 of experts -- expert reports, we were notified -- under
11 the protective order, you have to give a certain amount
12 of notice "We're going to show our expert some
13 confidential information" -- we were notified that they
14 had engaged Dr. Bims for this case.

09:33AM

15 THE COURT: Was that the first time you
16 learned of Dr. Bims' involvement in this case?

17 MR. LEVY: Yes.

09:33AM

18 THE COURT: Okay. And I'm aware of the steps
19 you took thereafter. Tell me what evidence you have in
20 the record that you shared confidential information with
21 Dr. Bims that's relevant to the issues in this case.

09:33AM

22 MR. LEVY: So, the -- you know, it actually --
23 I'd like to lay a little foundation here to explain how
24 difficult it was to obtain some of this information. The
25 cases that Dr. Bims worked on for LGEMU were ITC

1 investigations. They're covered by protective orders.
2 The ITC protective orders are -- I don't want to use a
3 hyperbole here. But they're incredibly strict, to the
4 point where, you know, even though LGEMU was a party to
09:34AM 5 the case, they can't access any of that information
6 today. So, we worked with LGEMU and its prior counsel,
7 the Fish & Richardson law firm, to try to get some
8 information about what it is exactly that they did in
9 that case. Unfortunately, they couldn't share all of it
09:34AM 10 with us; but there's plenty of information that's public.
11 We provided some of it to your Honor now to -- to MTe1.

12 It's clear that a number of the same products
13 at issue here were at issue in that case. The technology
14 at issue was --

09:34AM 15 THE COURT: Tell me how that's clear. What
16 I'm really looking for now from you is you just point out
17 to me the support in the record for these issues, and
18 then I can hear from the other side on those.

19 MR. LEVY: Yes, your Honor. So, one of the
09:34AM 20 products at issue in the prior case -- there were a
21 number of them, and we have them --

22 Bill, can you pull up one of the exhibits that
23 shows which products, where --

24 I know it's in our briefing, the LG products
09:35AM 25 that were at issue in the prior case. They included as

09:35AM

1 an example the LG Optimus S. There were a number of
2 other products. The LG Optimus S is one of the products
3 at issue in this case. Not only is it at issue in this
4 case, but it is -- in Dr. Bims' second expert report, it
5 is the product that he analyzes. It's the one he goes
6 through.

09:35AM

7 In terms of the technology at issue, just from
8 MTel's own papers even -- there's not a dispute here --
9 it involves that the patents discuss transmitting
10 information, how transmission to and from accused devices
11 operate. I think you'll see a little bit later today
12 there's a -- you know, in the discovery that's been
13 demanded in this case, they describe that same technology
14 for these same products.

09:36AM

15 THE COURT: So, tell me where in the record is
16 the information about what the products were that were at
17 issue in the ITC proceedings.

18 MR. LEVY: Yes, your Honor. I think we're
19 trying to pull that up right now.

09:36AM

20 THE COURT: Okay.

21 MR. LEVY: And I apologize. We didn't have a
22 whole lot of preparation on this.

09:36AM

23 THE COURT: And, I mean, if you -- you don't
24 have to physically show me if you can tell me; but if
25 you're not sure, then I'll wait.

1 MR. LEVY: Thank you, your Honor.

2 If I may consult with my counsel.

3 THE COURT: Yes, of course.

4 MR. LEVY: Which exhibit is it, Mr. Barrow?

09:36AM

5 MR. BARROW: Exhibit N.

6 MR. LEVY: Exhibit N. It's the complaint from
7 the ITC investigation and it lists -- you know, these ITC
8 complaints are very long and they include lots of
9 information, including specific properties that are
10 accused, and you can see one of them is the Optimus S,
11 the US670. We list a number of others. It's in our
12 Exhibit N, which is the complaint from the 800
13 investigation, 337-TA-800.

09:36AM

14 THE COURT: It's Exhibit N to Document 85,
15 which is your Motion to Disqualify.

09:37AM

16 MR. LEVY: I believe it's Document 85, yes.

17 THE COURT: And that would show the products
18 in it where?

19 MR. LEVY: Page 25 of that exhibit.

09:37AM

20 THE COURT: Okay.

21 MR. LEVY: I'm reading the citation. I don't
22 have that exhibit in front of me, your Honor. My
23 apologies.

24 Some slow technology, your Honor.

09:38AM

25 THE COURT: Okay. I see that you have

1 highlighted on that page it looks like LG products
2 starting with Revolution and then Ally, Fathom, Optimus.

3 Which of those is at issue in this case?

4 MR. LEVY: Well, there are a number of them.

09:38AM

5 The one I pointed to is the one I have in my notes. But
6 it's in our briefing. We identify a number of them. But
7 a good example is the Optimus S. I believe that Optimus
8 C is also in this case.

9 THE COURT: Okay.

09:38AM

10 MR. LEVY: We'll grab that for you right now,
11 your Honor.

12 The LG Genesis, the Optimus C, the Optimus S,
13 and the Revolution.

14 THE COURT: And those were at issue in the ITC
15 proceeding and also in this proceeding?

09:39AM

16 MR. LEVY: They were at issue in the ITC
17 proceeding; and they are at issue in this proceeding,
18 your Honor.

19 THE COURT: And was that the first ITC
20 proceeding?

09:39AM

21 MR. LEVY: I think the 800 is the second.

22 THE COURT: So, in the ITC 800.

23 MR. LEVY: Yes, your Honor.

24 THE COURT: Okay. All right. And I saw the
25 documents that you just tendered for *in camera* review.

09:39AM

1 Those show meetings with counsel and similar events and
2 the amount of the billings.

3 MR. LEVY: Yes, your Honor, as well as, you
4 know, the fact of shared attorney notes, the discussion
09:40AM 5 of non-infringement theories.

6 THE COURT: Okay. Tell me about the timing of
7 this agreement. I saw in the briefing something about
8 when the agreement on the 800 matter, which is the second
9 of the two matters, expired.

09:40AM 10 MR. LEVY: Yes, your Honor.

11 THE COURT: What's your position on that?

12 MR. LEVY: Yes. Thank you.

13 So, there are two issues of timing in this
14 agreement. The agreement covers, you know, the scope of
09:40AM 15 work and whatnot. Where the parties disagree is with
16 respect to the confidential information; and this gets to
17 the first part of the general test in *Lake Cherokee Hard*
18 *Drive* and also in the *Koch* case, whether the opposing
19 party had a confidential relationship with the expert.

09:41AM 20 The agreement -- and we have one on the
21 screen -- says -- starts at the "Confidential
22 Information" section; and it says, "The obligation of
23 this clause shall survive the expiration or termination
24 of the agreement." And the first part there that's
09:41AM 25 discussed is the confidentiality. And that makes sense.

1 That survives expiration. So, the confidentiality
2 provision, there is no termination; and, frankly, that
3 makes sense. No one would suggest that Dr. Bims is free
4 to, you know, post online at this point what he's
09:41AM 5 learned, you know, from attorney notes and whatnot. That
6 remains confidential just like it does for attorneys.

7 Mr. Barrow, if you could scroll down.

8 Right here, Subsections D and E, they include
9 limited term provisions; and they are -- the first is
09:41AM 10 that Dr. Bims agreed not to be opposed to LG in any
11 matter or in any matter in which LG might become a party
12 during the term of this agreement. Now, this goes much
13 farther than, you know, *Lake Cherokee* or the *Koch* case.
14 This is you just can't be adverse to us just in any case
09:42AM 15 for anything, can't work as a consultant, you know. That
16 only survives during the term of the agreement. After
17 the agreement, the confidentiality still applies.

18 THE COURT: So, tell me about the term of the
19 agreement.

09:42AM 20 MR. LEVY: How long the agreement lasted, your
21 Honor?

22 THE COURT: Right. What were the dates that
23 comprised the term of this agreement?

24 MR. LEVY: May I consult with --

09:42AM 25 THE COURT: Yes.

1 MR. LEVY: -- counsel?

2 Thank you.

3 Your Honor, my apologies. We'll have to get
4 that information. It gets a little bit difficult because
09:42AM 5 the case went up to the Federal Circuit and then came --
6 and because of that extra period of time, it went quite a
7 ways. It's 2013-2014. And we'll have to -- I'm happy to
8 provide that date for you today.

9 THE COURT: As I recall, there was something
09:43AM 10 that I saw in the briefs at least about alternate dates.
11 I don't remember whether it was the earlier or the later
12 of, but a variety of different things. Does that relate
13 to this agreement?

14 MR. LEVY: Alternate dates? I'm not sure,
09:43AM 15 your Honor. I think -- my understanding is that the
16 dispute over the term of the agreement is really over
17 whether the expiration of the agreement applies to the
18 entire confidentiality provision or just to those two
19 later portions of that section. We can provide the -- I
09:43AM 20 can get you today the final date when this engagement
21 would have ended.

22 THE COURT: Okay. Well, we're going to take
23 it up now -- let me see -- but I'm trying to find the
24 part of the brief that dealt with that.

09:44AM 25 Okay. This is -- I'm looking at MTel's

1 opposition. On page 4 of their opposition, they say
2 (reading) the agreement was signed February 2, 2012.
3 Paragraph 2 of the agreement states that it expires no
4 later than either 2 years from the effective date, 1 year
5 from the completion of any work performed, or 1 year from
6 the completion of the *InterDigital* litigation.

09:44AM

7 MR. LEVY: Yes, your Honor.

8 THE COURT: So, that's what I'm trying to
9 figure out, what is -- which of those dates is the
10 applicable one.

09:44AM

11 MR. LEVY: What I'm struggling with here, your
12 Honor, is that the case went on for some time because it
13 went up to the Federal Circuit and I just don't have that
14 date and I'm not sure if the two years eclipses that or
15 not.

09:45AM

16 THE COURT: Well, MTel represents in their
17 brief that the *InterDigital* litigation concluded on
18 February 12th, 2014, as you can see there. Do you agree
19 or disagree with that?

09:45AM

20 MR. LEVY: At the ITC it did.

21 THE COURT: Okay. So, that's the date it
22 ended at the ITC. Okay.

23 MR. LEVY: That's right, your Honor. And I
24 just want to stress that regardless of when the agreement
25 ended, that the -- the engagement on that particular case

09:45AM

1 ended, the confidentiality still stayed.

2 THE COURT: I understand that. I'm trying to
3 get a better understanding of what Dr. Bims'
4 understanding of his arrangement with LG would be,
09:46AM 5 which -- before I talk to MTel about it, but --

6 MR. LEVY: Yes, your Honor. And I would
7 submit that Dr. Bims' understanding may be helpful, but
8 that what's controlling here is what MTel's understanding
9 of the law should be. And just speaking as a

09:46AM 10 practitioner who deals with this sort of issue on a
11 regular basis, when you engage an expert, the first thing
12 you do is you find out if that expert has worked for the
13 opposing party before; and if so, you know, oftentimes
14 you just move on to the next expert. If you still really

09:46AM 15 want that expert for some particular reason, you dig a
16 little deeper. And if you find out that it covered the
17 same technology or the same products, then you really do
18 have to move on. I mean, at some point you're just --
19 you're conflicted. And that's from the counsel side of
09:46AM 20 things.

21 I've certainly been on conversations where the
22 expert says, "You know, I think I can do this"; and I
23 know from my side, sitting -- from my side of the desk,
24 you know, I appreciate what the law is and I say, "I'm
09:47AM 25 glad you're able to do that and you believe you're able

1 to do that, but that's just not permitted here from my
2 side." We don't want to end up in the very situation
3 that MTel finds itself in here, facing a Motion to
4 Disqualify because I hired an expert that has a conflict.

09:47AM

5 THE COURT: Right. Do you have any evidence
6 that Dr. Bims performed work after the latest invoice
7 that you submitted, which is July 10 of 2012?

09:47AM

8 MR. LEVY: No, your Honor. We don't have
9 evidence of additional work after that for LGEMU on these
10 two cases.

11 THE COURT: Okay. Thank you.

12 And I've read your briefs on it and I'll give
13 you a chance to respond, but I'd like to hear from MTel
14 now.

09:48AM

15 MR. LEVY: Thank you, your Honor.

16 THE COURT: Thank you, Mr. Levy.

17 MR. TAYLOR: Good morning, your Honor.

18 THE COURT: Good morning, Mr. Taylor.

09:48AM

19 MR. TAYLOR: Now, I would like to first
20 address two examples of possible waiver by LG that would
21 render this issue moot. First, when LG first objected to
22 Dr. Bims, they did so under the protective order. Their
23 protective order gave them ten days to file an official
24 motion seeking to preclude Dr. Bims' ability to view
25 confidential information. Those ten days came and went,

09:48AM

09:49AM

1 with the only exception during that time period being
2 Dr. Bims' inability to view confidential information in
3 time to submit his expert report. LG never filed that
4 motion, instead filing the present Motion to Disqualify
5 him.

09:49AM

6 Second, if you look at the terms of the
7 agreement, specifically the paragraph -- I believe it's
8 8. My eyes are, sadly, not able to see it from here.
9 But specifically the provision that they claim is
10 indefinite regarding confidentiality. A provision of
11 that paragraph also says that they are not -- or the very
12 existence of disagreement is confidential. By producing
13 this document not under the privilege order, not for the
14 *in camera* review like the other documents which are
15 subject to our other agreement, but by producing the
16 document in the open, LG destroyed that provision.

09:49AM

17 Now --

09:50AM

18 THE COURT: I don't think either of those
19 constitute a waiver of their Motion to Disqualify. I --
20 what I guess I'd like to hear first is: Do you have any
21 argument against the position that Dr. Bims did undertake
22 an arrangement with LG that justified them in believing
23 that they would keep information they gave him
24 confidential?

09:50AM

25 MR. TAYLOR: Yes, your Honor.

1 THE COURT: Tell me about that.

2 MR. TAYLOR: Yes, your Honor. First is the
3 agreement itself. And this is exactly what your Honor
4 was referencing a few minutes ago with opposing counsel
09:50AM 5 in that the 800 agreement has an expiration date and
6 MTel's engagement of Dr. Bims occurred outside of that
7 expiration date.

8 THE COURT: Okay. No, I'm back on -- actually
9 what I'm asking about is what is described in the *Koch*
09:51AM 10 case in the Fifth Circuit about the first step of that
11 test, that LG has to show that it was objectively
12 reasonable for them to conclude that a confidential
13 relationship existed. And that's at some point, not
14 necessarily at the time you retained him.

09:51AM 15 MR. TAYLOR: Understood, your Honor. And
16 MTel's issue with the two factors actually goes to the
17 second factor, which is the relevancy of the documents.

18 THE COURT: I assumed that, but I just wanted
19 to get that expressed.

09:51AM 20 Okay. So, tell me about your position on the
21 second factor. Why is the information that was disclosed
22 to Dr. Bims not relevant to this proceeding?

23 MR. TAYLOR: Yes, your Honor. As your Honor
24 knows, the mere disclosure of any confidential or
09:51AM 25 privileged information is not adequate to disqualify an

1 expert from adverse representation in the future.

2 Instead, the disclosed information must be relevant to
3 the case.

4 Taking the matters that were, up until this
09:52AM 5 morning, for *in camera* review -- I believe, your Honor,
6 I'm missing the remote.

7 MR. LEVY: Your Honor, may I confer with
8 counsel for just a moment regarding disclosure of this --
9 putting this information up on the screen?

09:52AM 10 THE COURT: Yes. All right.

11 MR. LEVY: Your Honor, my misunderstanding.
12 Sorry. We were putting stuff up on the board, and I just
13 wanted to make sure we weren't --

14 THE COURT: That's Mr. Walter. He's with me.

09:53AM 15 MR. LEVY: My apologies. Congratulations on
16 the position.

17 MR. TAYLOR: That was my next step. All
18 right.

19 MR. LEVY: My apologies, your Honor.

09:53AM 20 THE COURT: He will be with Chief Judge Prost.
21 So, maybe he'll have a chance to look at this again.

22 MR. TAYLOR: As your Honor can see, the first
23 line is specifically discussing the 3GPP standards. Your
24 Honor, mobile phones -- even to the extent that there are
09:53AM 25 accused devices in the ITC investigation that are also

1 accused in this case, mobile phones are capable of
2 numerous upon numerous functions and activities. You can
3 play games on them; you can make calls on them.

09:53AM

4 THE COURT: Well, what is Dr. Bims' area of
5 expertise?

6 MR. TAYLOR: Mobile telecommunications.

7 THE COURT: All of it?

8 MR. TAYLOR: He has had experience in almost
9 every minute factor of it. Yes, your Honor.

09:54AM

10 THE COURT: Well, I'm -- it's the same
11 products at issue in this case as were in the ITC case
12 where he was retained by LG; is that right?

13 MR. TAYLOR: Yes, your Honor.

09:54AM

14 THE COURT: So, what can you tell me about the
15 difference in the issues between the two proceedings?

16 MR. TAYLOR: Yes, your Honor. And I believe
17 one of the cases actually cited by LG speaks directly to
18 this issue; and that's the *Nike* case, 2006 U.S. District
19 LEXIS 97109. And in that case the courts did not

09:54AM

20 specifically look to the broad similarity between the two
21 issues but, rather, they looked at the claims. And this
22 is covered to extent in MTel's briefing on this issue.

23 But the claims between the patents at issue and the
24 patents at issue in the ITC investigation are not

09:55AM

25 overlapping.

1 And in that *Nike* case, the court did not
2 disqualify the same expert from opining regarding the
3 defendant's infringement of another patent regarding the
4 same technology. So, what we really need to do is look
5 at the similarity between the claims on this issue.

09:55AM

6 THE COURT: I do not necessarily agree with
7 that analysis, and I -- I'm really not concerned about
8 what another district court has done in a different case.
9 What I want to know is: What can you tell me about how
10 different the issues are that Dr. Bims consulted on
11 before and has before him now?

09:55AM

12 MR. TAYLOR: Yes, your Honor. As your Honor
13 can understand, unfortunately, our awareness of exactly
14 what Dr. Bims did in the ITC investigation is somewhat
15 limited. We are given only the information that we have
16 before us today, meaning the documents right here that
17 discuss the review of the 3GPP standards and the
18 documents that we were able to pull off the ITC website.

09:55AM

19 Now, Dr. Bims' work in the ITC investigation
20 focused primarily on the 3GPP standards of transmitting
21 and receiving radio frequency signals between the device.
22 Here, especially in the '946 case, Dr. Bims' work has
23 focused on more of an application layer, to the extent
24 that the e-mail application -- and Dr. Bims' work on this
25 is in the infringement mind-set. So, Dr. Bims has

09:56AM

09:56AM

1 examined whether the e-mail application receives an
2 entire message, whether it requests a portion of the same
3 message; and it's focusing on those applications.

4 Similarly, for the '428 patent we have been
09:56AM 5 looking at the Google Cloud Messenger application. And
6 for the '506 patent we have been looking at the calendar
7 and messaging applications. So, similar to how a child
8 can play the War of the Clans application game on a
9 phone, these are applications that are running and unique

09:57AM 10 to the specific software. Dr. Bims' work in this issue,
11 in this case, has dealt primarily with the applications,
12 whereas his previous work in the ITC investigation dealt
13 with the compliance with the 3GPP transmission standards.

14 THE COURT: Well, when MTel retained Dr. Bims
09:57AM 15 in connection with this case against LG, did Dr. Bims
16 make MTel aware of his prior consulting work for LG?

17 MR. TAYLOR: Yes, your Honor. Dr. Bims stated
18 that he had worked with LG in the past. As referenced
19 earlier, the terms of the agreement explicitly forbade
09:58AM 20 Dr. Bims from discussing in detail or even revealing the
21 existence of the agreement itself. However, we were
22 able, through public information, to investigate the ITC
23 prior matters and to determine that there was not
24 relevancy to the claims at issue.

09:58AM 25 THE COURT: And what is your position on when

1 Dr. Bims' consulting agreement with LG terminated?

2 MR. TAYLOR: Our opinion is that the agreement
3 expired no later than February 12th, 2015. MTel
4 disclosed Dr. Bims on March 30th, 2015.

09:58AM

5 THE COURT: And when did you retain Dr. Bims?

6 MR. TAYLOR: Shortly before we disclosed him.

7 As your Honor may remember, in the previous
8 litigations in this case -- and specifically the *Apple*
9 and *Samsung* litigations -- MTel had used a Dr. Nettleton.

09:59AM

10 MTel had been in negotiations with Dr. Nettleton for his
11 retention in this case and ultimately decided not to
12 pursue that avenue. And Dr. Bims' familiarity with the
13 patents -- or at least some of the patents from the
14 *Amazon* case where he had provided an opinion, although
15 not testified in court, made him the next obvious choice.
16 After we cleared the ITC investigation issue, we
17 disclosed him to LG.

09:59AM

18 THE COURT: So, tell me when you first made
19 contact with Dr. Bims about the LG case.

09:59AM

20 MR. TAYLOR: Your Honor, speaking from memory,
21 I would -- it was prior to the February 12th, 2015, issue
22 wherein Dr. Bims told us that he had worked with LG in
23 the past. At that point we continued our negotiations
24 with Dr. Nettleton. When Dr. Nettleton --

10:00AM

25 THE COURT: Give me a date. And you can give

1 me your best recollection of the date, but just saying
2 that it's prior to something doesn't really help.

3 MR. TAYLOR: Yes, your Honor. I would say the
4 initial contact whereupon Dr. Bims informed us of his
10:00AM 5 potential conflict with LG occurred in January, 2015.
6 The subsequent communications wherein we asked Dr. Bims
7 to consult for us in this case occurred in early March,
8 2015, from my best recollection.

9 THE COURT: And has MTel retained Dr. Bims in
10:01AM 10 the past on other cases?

11 MR. TAYLOR: Yes, your Honor, on the *Amazon*
12 case.

13 THE COURT: Okay. And what was the time frame
14 of that retention?

10:01AM 15 MR. TAYLOR: Honestly, your Honor, I -- and
16 excuse me. Allow me to clarify. Do you mean the date we
17 first made contact?

18 THE COURT: Well, just -- I mean, that work
19 was done during -- what -- 2013 and 2014 or what --

10:01AM 20 MR. TAYLOR: Yes, your Honor.

21 THE COURT: Okay. All right. Go ahead and --
22 if you have anything further to say that will help me
23 understand your position on the relevancy or lack
24 thereof, maybe what I can do is let LG address that issue
10:02AM 25 and then give you a chance to respond. That might be the

1 more productive way.

2 MR. TAYLOR: Thank you, your Honor.

3 THE COURT: Thank you, Mr. Taylor.

4 MR. LEVY: Thank you, your Honor.

10:02AM

5 With respect to the dates, I'd just like to
6 clarify a couple of things, if I could. The first
7 contact -- the first engagement, I believe, was
8 September, 2013; and that was in the *Clearwire* case. For
9 MTel, that was the first time they engaged Dr. Bims. I

10:03AM

10 believe there was some confusion about which date. He
11 was also used in the *Amazon* case but initially in the
12 *Clearwire* case.

13 I would also say, with regards to what
14 Dr. Bims would have thought and what his understanding
15 was, you know, they have access to Dr. Bims. Frankly, if
16 I was on the other side of this motion, I would have
17 attached a declaration explaining Dr. Bims' position,
18 Dr. Bims' declaration, this is why these are different.

10:03AM

19 We can't get all that deeply into the work he
20 did in the prior cases because it's sealed. We're able
21 to --

10:03AM

22 THE COURT: I don't need you to get into the
23 work, but you certainly know what the ITC proceeding was
24 about.

10:03AM

25 MR. LEVY: It covered a variety of technology.

1 There were two proceedings. There was the 3G technology
2 at issue there, how the transmissions to and from the
3 accused devices operate. That was certainly one aspect
4 of the 800 investigation. MTel agrees. That's how they
5 describe it, frankly. The 3G technology regarding
6 transmission to and from the accused devices, that's
7 present in the current devices. You know, I think what
8 you'll see a little bit later -- maybe we can put it up.

10:04AM

9 It's going to come up in the Motion to Compel
10 argument that's going to come up later today. But one of
11 the sets of documents that they have asked us for are
12 documents related to the technical operations of LG's
13 products.

10:04AM

14 Actually if we could put up the actual letter,
15 the categories of information.

10:04AM

16 They describe the categories of information
17 they want; and this is what we're talking about,
18 transmissions to and from the accused devices and the
19 network. I mean, our best understanding is that there is
20 a considerable amount of overlap here and -- not just in
21 the type of technology but in the products themselves.

10:05AM

22 Not to mention that Dr. Bims would have sat in the
23 room -- the -- you know, the *in camera* review documents
24 that have been disclosed today, you know, they talk
25 about, you know, calls with, for example, Linda Kordziel,

10:05AM

1 an excellent attorney at Fish & Richardson, discussing
2 their attorney notes and non-infringement theories from
3 the case. These would have dealt with the products in
4 those cases. The products in those cases are -- at least
5 overlap with products in these cases. There would have
6 been discussion of how these devices operate, how they
7 operate on the network.

8 Is this the letter?

9 So, for example, they -- one of the types
10 of -- one of the informations they asked for was, you
11 know, relevant servers, communications between the
12 servers and the --

13 Scroll down just a little bit, if you could.
14 Right there.

15 (Reading) protocol documents, state-flow
16 diagrams, and/or flowcharts showing the communication
17 between the two devices and the relevant server. They're
18 talking about transmissions to and from the network and
19 the accused device.

20 Which device are they talking about? Well, in
21 Dr. Bims' infringement report in this case, he's talking
22 about the LG Optimus S. What was he talking about in the
23 800 investigation? Well, among other devices, the
24 Optimus S, also the Optimus C. I'm drawing a blank right
25 now on the products.

10:06AM

1 The next category of documents, again,
2 (reading) protocol documents, state-flow diagrams,
3 flowcharts showing the communication between an accused
4 device and the relevant server when. And again these are
5 communications between these devices. This is what they
6 have been asking us for.

10:06AM

7 You know, we'll discuss that in the Motion to
8 Compel; but this is the information they're saying that
9 they don't have and they need in this case. This is the
10 basis for them wanting to, you know, put in additional
11 expert reports from Dr. Bims. We're talking about the
12 same information, same kind of technology for the same
13 products. Again, you know, if Dr. Bims had a different
14 understanding and I was on the other side of this motion,
15 I would put in a declaration. I would ask: Where is the
16 declaration?

10:07AM

17 THE COURT: All right.

18 MR. LEVY: Are there any other questions, your
19 Honor?

10:07AM

20 THE COURT: I'm looking at the ITC proceeding,
21 at least the third amended complaint in the 800
22 proceeding which is attached to your motion; and I am
23 wondering if that document does not have something in it
24 that would show what the scope of the issues were in that
25 case.

10:08AM

1 MR. LEVY: Your Honor, we'll try to pull that
2 up right now.

3 I would also add, your Honor, just given the
4 timing, apparently the first contact, we understand now,
5 was while Dr. Bims was still under the agreement. So,
6 the first discussion -- excuse me -- about this case
7 between MTel and Dr. Bims would have been while all
8 parties agree he was still under contract to LG. The
9 agreement hadn't expired. So, even setting aside the law

10:08AM

10 on disqualification, there's also that -- I hate to call
11 it "impropriety." But at the very least at that point,
12 you know, make the disclosure so let's get this issue
13 resolved. Because from our side we'd like to get this
14 handled -- we would have liked to have gotten this
15 handled before expert reports were due; and I'm sure from
16 their side, if they would have needed to find another
17 expert, they would have wanted as much time as possible
18 with that.

10:08AM

10:08AM

19 THE COURT: While you're doing that...

10:09AM

20 (Discussion off the record between the court
21 and the law clerk.)

22 MR. LEVY: Your Honor, if I may.

23 THE COURT: Yes, you may.

24 MR. LEVY: We've pulled up the ITC
25 investigation complaint and gotten to the technology and

10:10AM

1 products at issue. I'll just read the highlighted
2 section. This is on -- which exhibit is this? We'll get
3 you the exhibit number. I don't want to have to scroll
4 all the way back up.

10:10AM

5 THE COURT: I think this is Exhibit N --

6 MR. LEVY: Yes, that's right, your Honor.

7 Thank you.

8 THE COURT: -- to your motion.

9 MR. LEVY: Paragraphs 4.1 and 4.2. The

10:10AM

10 devices -- you know, they're talking about the products
11 and technology at issue. "These devices allow users to
12 place and receive telephone calls and/or to run data
13 applications, such as web browsing, email, and audio and
14 video streaming." Well, what are they talking about?

10:10AM

15 These wireless devices at issue operate as,
16 for example, cellular mobile telephones, they allow
17 streaming, communication, third-generation or 3G cellular
18 systems. These are the products that are at issue in
19 this case.

10:11AM

20 Some of the products at issue in this case are
21 LTE, or fourth-generation products; but certainly there
22 are plenty of 3G products also at issue in this case. I
23 would also note that all the 4G, or LTE, products are
24 also 3G compatible. They work on the same networks.

10:11AM

25 It's the same issue. It's the -- it's transmissions to

1 and from.

2 I'm sure this court will recall the -- you
3 know, the hour and plus we spent discussing what exactly
4 is transmitted and retransmitted during the *Markman*
10:11AM 5 hearing. And both -- as my co-counsel has just reminded
6 me, both browsing and e-mail were at issue in that case.
7 Both browsing and e-mail are accused in this case.

8 THE COURT: All right. Do you have any other
9 argument you want to offer on the relevance issue?

10:12AM 10 MR. LEVY: No, your Honor.

11 THE COURT: Okay. Thank you, Mr. Levy.

12 MR. TAYLOR: Thank you, your Honor.

13 The patents at issue in the 758
14 investigation -- and this is reading from MTel's
10:12AM 15 opposition on page 8. The patents at issue in that
16 investigation include the '092 patent which pertains to
17 the recording of audio, the '604 patent which pertains to
18 associating an image of an individual with that
19 individual's contact information, the '464 and '447
10:12AM 20 patents which pertain to handoffs between networks --
21 excuse me -- which pertain to processing image data, the
22 '205 patent which pertains to handoff between networks,
23 and the '732 and '611 patents which globally apply to
24 transmitting information.

10:13AM 25 Likewise, the patents in the 800 investigation

1 pertain to the 3G -- specifically the 3G technology
2 underlying how transmissions to and from the accused
3 devices operate.

4 THE COURT: You know, I've got a copy of the
10:13AM 5 '205 patent that was at issue in the 758 proceeding and
6 it has some terms in it that appear remarkably similar to
7 the ones that are at issue in the MTel cases that we have
8 been working on. And in the abstract it talks about soft
9 handoff and hard handoff. It talks about the
10:13AM 10 communication from the first base station and the second
11 base station, and I -- it certainly looks related to what
12 we have been dealing with in these cases.

13 MR. TAYLOR: Yes, your Honor. I would
14 specify, however, that those patents at issue and the
10:14AM 15 issues dealing with handover and the first transmission
16 and second transmissions pertain to patents that are not
17 at issue in this case. Specifically those -- your Honor
18 may be remembering from the *Apple* trial those dealt with
19 the '403 patent, the '210 patent, and '891 patent, none
10:14AM 20 of which are at issue in this case, none of which
21 Dr. Bims has been asked to opine regarding how LG may or
22 may not infringe those patents.

23 THE COURT: The arguments about soft handoff
24 and hard handoff, those are not at issue in this case?

10:15AM 25 MR. TAYLOR: No, your Honor.

1 THE COURT: Which current case are those at
2 issue?

3 MR. TAYLOR: That may be, your Honor,
4 AT&T/Leap, previously Clearwire, previously Apple.

10:15AM

5 THE COURT: All right.

6 MR. TAYLOR: As a point of reference, your
7 Honor, internally -- and I believe externally as well --
8 it has been referred to as the "transmission patents";
9 and those patents are not at issue in this case.

10:15AM

10 Instead, at issue in this case are what we call the
11 "messaging patents." And as I had mentioned earlier,
12 those pertain to the specific applications accused
13 operating on the LG devices.

10:16AM

14 THE COURT: Tell me why you need Dr. Bims as
15 opposed to some other expert who has not been under
16 contract with LG on these products.

10:16AM

17 MR. TAYLOR: Yes, your Honor. At the time
18 disclosure came up, Dr. Bims' familiarity with the
19 patents from the *Amazon* case placed him in a very small
20 pool of potential candidates that could come up to speed
21 quickly on the issues and that were familiar with the
22 underlying technologies. In addition, Dr. Bims himself,
23 his academic record, his experience, his -- what I would
24 simply call "litigation strategy." Dr. Bims' ability to
25 withstand cross-examination on the stand, Dr. Bims'

10:16AM

1 unique attributes that are unique to him as an
2 individual, in combination with his familiarities with
3 our patents, and his experience in the industry over the
4 past decades made him the viable choice at that time.

10:17AM

5 THE COURT: I'm just really concerned,
6 Mr. Taylor, with the fact that he has this prior

7 relationship. I -- you know, the documents that were
8 submitted *in camera* show that he billed in excess of
9 \$30,000 to LG on these proceedings. So, it wasn't just

10:17AM

10 that they were trying to conflict him out. He was doing
11 real work for them on the same products that are at issue
12 in this case. He met with their lawyers. He had access
13 to their strategy about these products. And I have not
14 heard any clear dividing line between what was at issue
15 in the ITC case and what is at issue here. I understand
16 there are differences, naturally; but I'm -- I just have
17 a lot of concern about allowing an expert to, in effect,
18 switch sides like that.

10:18AM

19 MR. TAYLOR: Your Honor, Dr. Bims never
20 represented LG in its case against MTel. So --

10:18AM

21 THE COURT: Not in this case. That's right.

22 MR. TAYLOR: I was just struck by your Honor's
23 inclusion of the words "switching sides," which has a
24 clear meaning in the case law on this issue.

10:18AM

25 THE COURT: I'm aware of it.

1 MR. TAYLOR: And, your Honor, I believe that
2 the policy considerations that the courts have examined
3 in these cases fall in favor of denying LG's request for
4 disqualification. Most specifically is -- are two.
5 First, that LG and MTel are not direct competitors.
6 Dr. Bims is an independent consultant. Dr. Bims is not
7 working on a product or service that is going to be
8 competitive to LG's. He signed agreements preventing the
9 disclosure of the confidential information that he will
10 receive, and he's not being asked to opine regarding any
11 functionality that's at issue in both this case and the
12 previous engagements.

13 THE COURT: How do we know that -- well, how
14 do you know that?

15 MR. TAYLOR: We know that by looking at the
16 information that is available to us.

17 THE COURT: And what information is that?

18 MR. TAYLOR: The ITC complaint, the patents at
19 issue in the ITC case, and the documents cited in MTel's
20 opposition that discuss the scope of the patents and
21 technology in the ITC case.

22 THE COURT: Okay. So, point me to the
23 evidence in the record by which we know what you just
24 said, that they're not related.

25 MR. TAYLOR: Yes, your Honor. Exhibit 0 to

1 MTel's opposition and Exhibit N to MTel's -- excuse me.
2 I believe these are actually Exhibits O and N to LG's
3 motion, which are also cited in MTel's opposition; and
4 these are specifically the complaint that discuss the --
5 and identify the patents at issue. I'm reading from
6 MTel's opposition on page 8.

10:20AM

7 That, when contrasted with Exhibits F, as in
8 Frank, through H, as in Harry, to MTel's opposition,
9 which are MTel's 3-1 claim charts that show the
10 functionality at issue in this case, show a clear divide.

10:21AM

11 THE COURT: Okay. Show me the clear divide.

12 MR. TAYLOR: The '092 patent, as I mentioned
13 earlier, discusses the recording of audio. MTel's 3-1
14 claim charts show specifically accusing the messaging
15 application for the '506 patent, the GCM application for
16 the '428 patent, and the e-mail application, specifically
17 the ability -- the very discrete functionality, not just
18 all e-mail, not the ability to compose an e-mail and send
19 it from your device, but the ability to receive an e-mail
20 that contains an attachment and specify the desire to
21 receive that attachment.

10:21AM

10:21AM

22 None of the patents listed in Exhibits O and N
23 to LG's motion contain any functionality that is
24 overlapping with that. Although at a high level there
25 may be overlap between those patents and other MTel

10:22AM

1 patents and at a high level the devices which are capable
2 of numerous features are -- may be the same, the
3 functionality -- the specific functionality accused in
4 this case was not at issue in the ITC investigation.

10:22AM

5 And, your Honor, this is information that we are able to
6 access. LG is coming to us and saying that there is a
7 burden, that there is a similarity; but we have seen no
8 evidence apart from a high-level accusation that both of
9 the devices are the same -- some of the devices are the

10:22AM

10 same in both cases, that there is any similarity. The
11 information that we are able to view, the information
12 that we are able to obtain does not meet any burden of
13 proving any similarity.

14 THE COURT: Well, they certainly meet

10:23AM

15 similarity on one basis; and that is they're the same
16 devices. And I'm not sure that that's not enough. I
17 think that when an expert has consulted regarding those
18 devices for the manufacture of them, for him to go and --
19 I mean, I'm surprised that he was willing to undertake
20 this. How can he know how this case is going to develop
21 in terms of what is going to end up being accused?

10:23AM

22 MR. TAYLOR: At the time of Dr. Bims'
23 inclusion in the case, shortly before his expert reports
24 were due, the deadline for identifying what was accused
25 and how those products operated was a few weeks away.

10:24AM

1 THE COURT: Talk to me about why there isn't
2 anything in the record from Dr. Bims saying, "Hey, this
3 is completely different than what I did before."

10:24AM

4 MR. TAYLOR: That there was never a conscious
5 decision to omit any such information. I cannot say with
6 any certainty as to why that information is not present
7 other than that it was never mentioned as something to
8 include. The scope of the claims -- looking at the case
9 law on the issue that examined the similarity between the
10 claims that the patents -- and the two issues --

10:25AM

11 THE COURT: You talking about just the *Nike*
12 case?

10:25AM

13 MR. TAYLOR: Yes, your Honor. There was --
14 also the *Power Mosfet Tech, LLC*, 2000 Westlaw 35727080,
15 which held that no confidential relationship existed when
16 the expert was never an employee of the party or informed
17 that consulting with the party would limit his future
18 employment.

10:25AM

19 THE COURT: Okay. Well, that clearly does not
20 apply here. There clearly was a confidential
21 relationship. He signed an agreement promising to keep
22 the information confidential, right?

10:25AM

23 MR. TAYLOR: Yes, your Honor. And that
24 agreement, to the extent that it prevented him from ever
25 being adverse to LG, also had a termination provision.

1 Your Honor, LGEMU markets and manufactures --
2 excuse me -- markets -- LGEMU markets mobile devices.
3 Allowing LG to interpret the confidentiality provision to
4 prevent anyone that ever works for them from ever having
5 anything to do with mobile devices extends the adverse
6 representation clause indefinitely. The only thing LGEMU
7 does is --

8 THE COURT: And I'm not --

9 MR. TAYLOR: -- market phones.

10 THE COURT: I'm certainly not agreeing that
11 this is a disqualification that will last for the rest of
12 Dr. Bims' career. However, I also know that the life of
13 these products is limited. They're going to roll out new
14 products. But here we're talking about the same
15 products, aren't we?

16 MR. TAYLOR: Some of them, yes, your Honor.

17 THE COURT: Yeah. And I think that is a
18 limiting thing in itself. The fact that his involvement
19 with MTel basically overlapped with at least the end of
20 his contract with LG shows that we're not talking about
21 something perpetual here. We're just talking about this
22 case.

23 MR. TAYLOR: A point of clarification on
24 something your Honor just mentioned.

25 THE COURT: Yes.

1 MR. TAYLOR: The -- earlier LG made reference
2 to a first engagement of Dr. Bims in *Clearwire*. My
3 earlier comment about MTel's first reach-out ever of
4 communication with Dr. Bims occurring in January was
5 specific to this case.

10:27AM

6 THE COURT: I understood that.

7 MR. TAYLOR: Thank you, your Honor.

8 And in that first communication, Dr. Bims
9 simply said, "I've previously worked for LG."

10:28AM

10 Additional -- any work that Dr. Bims did did not occur
11 until after LG's engagement with Dr. Bims had terminated.
12 There is no overlap.

13 THE COURT: Well, the -- I mean, I don't think
14 that, frankly, whether the contract had terminated or not
15 is the real issue; but, to me, the fact that the dates
16 are so close counts heavily in LG's favor. And that plus
17 the fact that it's the same devices at issue and that he
18 had the kind of role he did where he met with counsel and
19 was a part of their strategy sessions, I think that's a
20 compelling case.

10:28AM

10:29AM

21 MR. TAYLOR: I understand your Honor's
22 statement. I would simply urge consideration of the
23 position that Dr. Bims' meetings with counsel, as
24 evidenced by the documents we've seen today, discussed
25 the non-infringement and invalidity of specific patents

10:29AM

1 and the claims and the scope of those patents.

2 THE COURT: But it's the non-infringement by
3 the same products.

4 MR. TAYLOR: Yes, your Honor.

10:29AM

5 THE COURT: So, he would have gathered
6 information from LG about their views of how their
7 products operate and what their
8 infringement/non-infringement arguments would be.

10:30AM

9 MR. TAYLOR: Your Honor, the non-infringement
10 and operation is specific to the discrete functionality.
11 I've made reference several times to the numerous
12 functions that a device can do, a -- how a device can
13 transmit at a hardware level or with -- compliance with a
14 specific 3GPP standard that's not at issue in this case
15 would not raise the same issues of operation or
16 non-infringement than would be raised at the application
17 layer.

10:30AM

18 THE COURT: Well, I can tell you I guess the
19 way I'm analyzing this -- and I'll say it for the record
20 so that you can pursue it if you need to -- but I think
21 that once they have established that that confidential
22 relationship existed regarding the same devices, I think
23 that effectively that shifts the burden to your side to
24 show that despite that, it's not related; and I haven't
25 heard anything that is convincing in that regard.

10:30AM

10:31AM

1 Tell me what would be the effect now on your
2 case if Dr. Bims is disqualified.

3 MR. TAYLOR: The effect, in my unseasoned
4 opinion, would be catastrophic, that with trial set for
10:32AM 5 mid September, the removal of an expert regarding --
6 MTel's sole expert regarding infringement of the accused
7 devices would severely hamstring MTel's ability to
8 prosecute its case at trial.

9 THE COURT: Well, you have indicated that MTel
10:32AM 10 retained Dr. Bims in late February. This motion was
11 filed in mid May. Let's call it three months after that.
12 Is there any reason you can't get a new expert and put
13 yourself back in the same position you were with a
14 continuance of some similar period?

10:33AM 15 MR. TAYLOR: No, your Honor. And I believe
16 that would also implicate additional motions to be heard
17 today, specifically MTel's Motion to Compel, which may
18 have to bring additional discovery to light regardless.

19 THE COURT: Well, if I grant the Motion to
10:33AM 20 Disqualify, my inclination would be to also grant time
21 necessary for MTel to get another expert. And I guess
22 I'd like to hear from the defendant on that issue.

23 MR. TAYLOR: Thank you, your Honor.

24 THE COURT: Thank you, Mr. Taylor.

10:33AM 25 MR. LEVY: Thank you, your Honor.

1 Just a couple of points. Before I get to the
2 other issue, I just wanted to remind everybody about the
3 '428 patent which is in this case which addresses how a
4 network reestablishes communication with a device. You
5 know, I've heard some talk about transmission patents
6 versus messaging patents. Transmission has been a major
7 issue in this case. There are patents that deal with it.

10:34AM

8 But moving to the -- I appreciate that it may
9 be difficult for MTel at this stage; but when this first
10 came to light very -- I would say earlier on, back in
11 April -- March and April, we offered -- we said, "Look,
12 you guys have already submitted an expert report. Go out
13 and get another expert and have him sign on to that
14 expert report. We would be okay with that." It wasn't
15 the -- it was -- from our perspective, it -- we weren't
16 trying to sandbag them. This was a "Go out and get
17 another expert. That would be fine."

10:34AM

10:34AM

18 THE COURT: I will accept your statement on
19 that. I don't see anything in the record to make me
20 think that.

10:35AM

21 MR. LEVY: The other thing I would say is, you
22 know, the trial settings matter. We've exchanged
23 pretrial disclosures. The final pretrial order is due I
24 want to say Monday.

10:35AM

25 THE COURT: It's soon. I know the -- the

1 pretrial conference I think is August the 10th.

2 MR. LEVY: Yes, your Honor. And I think the
3 final pretrial order is due Monday. I believe it's
4 Monday. Motions in limine have been filed. Exhibits
10:35AM 5 have been exchanged, you know, deposition designations.
6 We're working on jury instructions and verdict forms. I
7 mean, we're quite a bit of the way there. We've you
8 know, reserved rooms for trial. I mean, we're pretty far
9 along. And with all due respect to MTel's current
10:36AM 10 situation, we tried to work this out beforehand. And it
11 would be difficult to put LGEMU in a position where we
12 have to kind of restart the process from three months ago
13 when we have been diligently working on this and trying
14 to get to a situation where we can, you know, resolve the
10:36AM 15 case.

16 THE COURT: Well, if I tell you that granting
17 your motion would cause a continuance of the trial, do
18 you still want the relief sought in your motion?

19 MR. LEVY: Yes, your Honor. Just to reiterate
10:36AM 20 what we said earlier, three months ago we were -- or two
21 months ago, rather, we -- two months before the motion,
22 we had suggested "Find another expert, and this will be
23 fine." We were okay with that then.

24 THE COURT: All right. Well, I can tell you
10:36AM 25 that I am going to grant the Motion to Disqualify

10:37AM

1 Dr. Bims; but I'm also going to grant MTel's request to
2 modify the current DCO to allow them to get another
3 expert. That doesn't mean we're going to do a restart,
4 but I -- what I'd like to do is ask y'all to take a few
5 minutes now to see if you can come to any agreement about
6 what the minimum time would be that would be necessary to
7 accommodate another expert to replace Dr. Bims.

10:37AM

8 MR. LEVY: Thank you, your Honor. And just so
9 that we understand what we're talking about, is this
10 within the time left between now and trial? That's -- or
11 considering that trial would have to be pushed out? And
12 then how far?

10:37AM

13 THE COURT: I'm thinking the trial would have
14 to be pushed out. And my question to you is how far.

15 MR. LEVY: Thank you, your Honor. We'll
16 discuss with counsel.

17 MR. GARDNER: Your Honor, can I ask one thing?

18 THE COURT: Yes, Mr. Gardner.

10:37AM

19 MR. GARDNER: Your Honor, the only thing,
20 respectfully, that worries me, if they're allowed to get
21 a new expert, what that new expert can do is wholesale
22 change up the case. If you're suggesting they can get a
23 new expert that can essentially opine exactly as Dr. Bims
24 has opined, I think that's one issue; but if they have a
25 new expert that comes in and has completely new theories,

10:38AM

1 that's a vastly different situation. And I want to ask
2 what the court intends in terms of -- I mean, essentially
3 is this expert adopting Dr. Bims' opinion; or is this
4 expert going to wholesale reopen the case?

10:38AM

5 THE COURT: I would say neither one. Clearly,
6 I would not allow the expert to wholesale change the
7 case; but I'm not saying that the expert has to simply
8 sign on to whatever Dr. Bims has done before. I would
9 expect the expert would put it in his words and do it his

10:38AM

10 way, but I -- the understanding would be that we're not
11 going to just redo everything. We're just going to allow
12 them to get another expert. You know, that's easy to say
13 and I might have to get into the weeds and decide

10:39AM

14 specific issues later, but my intent would be that it
15 would be reasonably close to what Dr. Bims did.

16 MR. GARDNER: Your Honor, on that point as
17 well, my understanding is they have not served --
18 Dr. Bims didn't serve an infringement report as to two of
19 the patents so -- but the fact that he didn't serve a
20 report is irrelevant to the disqualification motion. He
21 just neglected to do it or MTel neglected to do it.

10:39AM

22 THE COURT: Well, is that what's addressed in
23 their motion to modify the DCO; in other words, that they
24 submitted a report that was a follow-up report?

10:39AM

25 MR. LEVY: Yes. That's part of the Motion to

1 Compel/Motion to Strike issue that I'm sure the court is
2 going to hear in just a few moments.

3 THE COURT: Okay. Well, I can tell you that
4 I -- you know, my inclination is to allow them to cover
10:40AM 5 whatever Dr. Bims has covered so far in -- through their
6 new expert and that would include the report that he
7 submitted two weeks after he should have and -- although
8 I'll listen to the argument on that and if it -- I'm not
9 at this point prejudging that, but certainly that's a
10:40AM 10 possibility. I haven't heard what their explanation for
11 that is.

12 MR. LEVY: We look forward to arguing that
13 particular motion this morning, your Honor.

14 THE COURT: Okay. All right. Well, the
10:40AM 15 reason I want you to talk a little bit about what -- how
16 much time we need is that has some effect on these other
17 discovery issues that we're going to get into. So, I'm
18 going to take a brief recess now and ask you to consult
19 about that; and we'll start back up in a few minutes.

10:41AM 20 Thank you.

21 (Recess, 10:41 a.m. to 11:07 a.m.)

22 THE COURT: I understand that counsel have
23 agreed that we should take up the Emergency Motion to
24 Compel first. So, we'll -- let's go to that.

11:07AM 25 MR. TAYLOR: Thank you, your Honor.

1 THE COURT: Mr. Taylor.

2 MR. TAYLOR: MTel's Motion to Compel seeks to
3 compel a U.S. subsidiary tasked with marketing to U.S.
4 carriers the phones manufactured by its Korean parent to
11:07AM 5 produce documents relating to the technical operation of
6 the devices it sells. The U.S. subsidiary seeks to avoid
7 its obligation by arguing that the documents are in the
8 possession of its Korean parent. If this issue sounds
9 familiar, it's because it is. In April, 2014, this court
11:08AM 10 held a hearing on the same issue, ultimately ruling that
11 the defendant in that case, Samsung Telecommunications
12 America, was under an obligation to produce documents
13 that were in the physical possession of its Korean
14 parent.

11:08AM 15 The court is familiar with the law on this
16 issue. I have, nevertheless, collected a series of cases
17 that clearly lay out the obligations regarding discovery
18 that a party in this district faces.

19 Your Honor, may I approach?

11:08AM 20 THE COURT: Yes, as long as you provide a copy
21 to both sides.

22 MR. TAYLOR: The most important case, your
23 Honor, is on top. *Kamatani v Benq Corp.*, Civil Action
24 No. 2:03CV437, 2005 Westlaw 2455825, from the Eastern
11:09AM 25 District on October 4th, 2005. In that case Judge Ward

1 of this district held that a party is under an obligation
2 to produce documents when the party has the practical
3 ability, meaning the control in the ordinary course of
4 the business to obtain the documents.

11:09AM

5 MTel has diligently sought discovery of
6 information that the defendant in this case has the
7 practical ability to obtain. On November 21st, 2014,
8 MTel first requested documents by specific category. I
9 believe your Honor saw a copy of that letter earlier this
10 morning, and there's also a copy of that letter in the
11 folder that I have provided.

11:09AM

12 THE COURT: Okay.

13 MR. TAYLOR: This is also identified as
14 Exhibit A as part of MTel's Motion to Compel.

11:10AM

15 On December 11th, 2014, LG responded that they
16 did not possess the requested documents.

17 On January 22nd, 2015, MTel requested
18 documents between LG and the claimed third parties that
19 LG claimed possessed the documents. In that letter, MTel
20 also identified the rog deficiencies listed in MTel's
21 Motion to Compel.

11:10AM

22 February 19th, MTel followed up via e-mail
23 regarding the documents. LG responded on February 20th
24 promising a production of "next week."

11:10AM

25 THE COURT: Where is your best statement of

1 what it is you're seeking that they maintain is in the
2 custody of the Korean parent?

3 MR. TAYLOR: The November 21st letter included
4 in your folder, also attached as Exhibit A to MTel's
5 motion.

11:10AM

6 THE COURT: Okay. I have that, and that
7 apparently -- it appears to have 14 categories of
8 documents. Is it your understanding that they maintain
9 that all of those categories are in the custody of the
10 parent rather than LG?

11:11AM

11 MR. TAYLOR: It is my understanding that they
12 maintain that the documents are in the possession of
13 third parties, that those third parties are a split
14 between affiliates such as Google and other software
15 manufacturers, using Google as an exemplar, and its
16 Korean parent. LG originally identified this third-party
17 category in its correspondence and it wasn't until MTel's
18 Motion to Compel that it first became clear that one of
19 those third parties was the parent company and that issue
20 fully came to light in LG's opposition to the motion.

11:11AM

11:11AM

21 LG had objected to discovery requests, noting
22 that it was a subsidiary entity; but those objections
23 were included with a host of additional other objections.
24 It wasn't until the opposition that it clearly became
25 evident that LG was using the same tactic as had appeared

11:12AM

11:12AM

1 in the *Samsung* case. And I believe that this is very
2 evident in LG's first supplemental response to
3 Interrogatory No. 7 which sought information regarding
4 the technical operation of the document -- of the accused
5 products and the protocols with which those accused
6 products were compliant. LG's initial response to that
7 interrogatory, according to Federal Rule of Civil
8 Procedure 33(d), identified numerous documents. Those
9 documents did not provide information regarding the
10 technical operation. And in response, LG supplemented
11 its response to say that LG is a domestic sales and
12 marketing company and therefore only has limited
13 information regarding the accused technical functionality
14 in this case.

11:13AM

15 THE COURT: All right. Well, thank you,
16 Mr. Taylor. I'll give you a chance to respond, but I
17 think I want to hear from LG on this subject.

18 MR. TAYLOR: Thank you, your Honor.

11:13AM

19 MR. GARDNER: May it please the court. Allen
20 Gardner. May I have just a moment, sir --

21 THE COURT: You may.

22 MR. GARDNER: -- to get my stuff?

11:13AM

23 Your Honor, may I approach the other side's
24 table and your Honor's bench to give you some binders,
25 sir?

1 THE COURT: Yes.

2 MR. GARDNER: Your Honor, Allen Gardner for
3 Defendant LGEMU. And respectfully, sir -- oh, wait.

4 Can I get the slides up?

11:14AM

5 Your Honor, Allen Gardner for Defendant LGEMU;
6 and respectfully, sir, that has not and that is not the
7 issue as has been explained to them as of Monday. To be
8 very clear on the record, for purposes of any future
9 transcript or future proceeding, LGE Korea does not

11:14AM

10 consent to discovery via its subsidiaries. It does not
11 believe that that is appropriate. There are mechanisms
12 by which you can get discovery through the Hague or
13 through being sued. However, I am familiar with this
14 court's practices. I am familiar with the issues. And
15 we have checked with LG Korea on every single document
16 they requested, and we either don't have it or it's in
17 the possession of third parties.

11:14AM

18 And, your Honor, if I can, I want to take you
19 through --

11:14AM

20 THE COURT: When you say "we," you're talking
21 now just about U.S.?

22 MR. GARDNER: No, sir, I'm talking about LG
23 Korea. And if I can, I want to take you through -- it's
24 really easy to say, "Hey, we haven't produced technical
25 documents." That's real easy to say, but the proof is in

11:15AM

1 the pudding. And I'm going to go through, if it's okay
2 with you, every single category of documents to show you
3 exactly what we've done, why we've done it.

4 Respectfully, I believe at the end of the day you'll
5 agree that what we've done is more than satisfactory and
6 beyond what we ever would have had to have done.

7 THE COURT: All right.

8 MR. GARDNER: Okay. Your Honor, if I can, I'd
9 like to briefly --

10 If I could go to Slide 3, Mr. Barrow. I'm
11 sorry.

12 Your Honor, I've got a long timeline here and
13 I don't want to belabor it, but I may go back to it to
14 show you the diligence in this case and non-diligence
15 thereof. But one thing I do want to point out, this case
16 was filed in 2013. Okay? We got the infringement
17 contentions on August 19th, 2014. That was a year ago.
18 In the infringement contentions, they were replete with,
19 you know, Google does this, T-Mobile does that, Sprint
20 does this, AT&T does that. There are references all
21 throughout to third parties. Now, what we know from that
22 is MTel knew at least as of August, 2014, that there were
23 potentially third parties involved in this case.

24 Now if I can go to Slide 11, please.

25 Your Honor, from Slides 6 through 10 in front

1 of you, I've got plenty about the infringement
2 allegations. I won't bore you but what I represent is
3 true and you can see it through the slides.

4 Now, on November 12th, 2014 -- if I can go to
11:16AM 5 Slide 12 -- the plaintiff sent a letter --

6 Can you go back? Is that Slide 12? Can you
7 go to Slide 12?

8 Slide 11, then. Yes.

9 Slide 10.

11:16AM 10 Okay. On December 21st, 2014, we got the
11 letter from plaintiff. Okay?

12 And excuse me. I realized it's not here.
13 It's later in the presentation.

14 They admit that. They say -- and this is
11:16AM 15 cited from the Motion to Compel at page 2. They say,
16 "Hey, we first told them about documents that we wanted
17 in November." That's true. So, they waited three months
18 after the infringement contentions were due; and they
19 said, "Oh, by the way, here's the documents we want."

11:17AM 20 Fair enough. We're still under an obligation to produce
21 documents regardless; but here's when they first told us
22 what they want, realizing that they knew that third
23 parties were implicated.

24 If I can go to Slide 13.

11:17AM 25 And what Mr. Taylor just told you, sir, was

11:17AM

11:17AM

11:17AM

11:18AM

11:18AM

1 they never knew that we were talking about the LG
2 subsidiaries or we were talking about third-party
3 documents, we just never put them on notice. But, in
4 fact, on December 11th, 2014, we told them, "Look, there
5 are third parties that have information and LG Korea has
6 information but, nonetheless, you know, we -- we can't at
7 least get third-party information. Y'all know how to
8 subpoena folks." And at the very bottom it says, "If
9 MTel has any reason to believe that LGEMU possesses this
10 information, please let us know why; and if you want to
11 get on the phone, just please tell us. We'll be happy to
12 get on the phone." There was no phone call. There was
13 no e-mail. There was nothing. They said nothing.

14 And then later we produced discovery
15 responses.

16 If I can go to Slide 14.

17 We told them the exact same thing -- and this
18 is on December 29th -- "Look, LG's parent has some stuff
19 potentially and third parties have stuff." They were all
20 on notice of this at the end of December.

21 On January 22nd -- if I can go to the next
22 slide, Slide 15.

23 All they told us about on January -- this is
24 the first response we've had to any of these -- they say,
25 "Hey, what we need are these End User License

1 Agreements," these EULAs. And I'm going to get to those
2 in just a second. They said, "That's what we need, and
3 that's what we want." They also referenced
4 interrogatories that have since been settled already, but
5 that's what they told us they wanted. They said, "Hey,
6 we want these EULAs."

11:18AM

7 If I could go to the next slide.

8 The e-mail that was just referenced by
9 Mr. Taylor said, "Hey, by the way," on February 19th,
10 "hey, I need those EULAs. Where are the EULAs at? We
11 need the agreements between you and these customers and
12 folks."

11:18AM

13 Mr. Barrow responded on the 20th and said,
14 "Hey, I'm looking into that. We're trying to get you
15 that."

11:18AM

16 Now, on -- Slide 17.

17 It wasn't until March 5th, 2015 -- this has
18 tremendous bearing, in my opinion, on this whole
19 continuance issue and expert we'll get to -- that they
20 finally said, "Oh, wait a second. We want the EULAs;
21 and, oh, by the way, you've not given us some technical
22 documents." That's in the bottom second paragraph. They
23 hadn't said a word about this for four months, keep in
24 mind. But they say again, "We've got to have those
25 EULAs, and we haven't gotten any technical documents."

11:19AM

11:19AM

1 We came to the *Markman* hearing and a couple of
2 lawyers ran up to us real fast and said, "Hey, I want to
3 meet and confer with you. We need to file this Motion to
4 Compel."

11:19AM

5 And we said, "Guys, you know, is there
6 something we can work out? Can we work through this?"

7 And they said, "No. We're going to file this
8 Motion to Compel as a placeholder; and if we can work
9 this out, we'll withdraw it."

11:19AM

10 And I said, "You know, it's not right to just
11 file placeholder motions; but if you feel like you got to
12 do it, you got to do it."

13 They did it. They filed an emergency motion,
14 and they blamed us through the end of time for not
15 producing issues -- for not producing documents.

11:19AM

16 Now, let me tell you exactly why they are
17 wrong.

18 Go to Slide 19, please.

19 These End User License Agreements do not
20 exist. And let me tell you why they don't exist. I'll
21 give you five to ten reasons. If I don't get to ten, you
22 can tell me.

11:19AM

23 One, as the court is aware, when you go to a
24 website or you download software or whatever, there's
25 always that "I agree/I don't agree" and if you don't

11:20AM

1 agree, you don't it. That's an End User License
2 Agreement. Basically you, the court, are the end user of
3 the software or whatever and you're saying, "Hey, I agree
4 to the terms."

11:20AM

5 Obviously LG is not an end user of Google. LG
6 is not an -- what they want are End User License
7 Agreements between Google and between LG, whether LG
8 Korea or LG U.S. That's what they said they wanted.
9 They do not exist.

11:20AM

10 Now, we have asked not only LGEMU, which
11 produced the MADA agreement -- which is the Mobile
12 Application Distribution Agreement, the only agreement
13 that we have in terms of an agreement with Google. We
14 produced that to them months ago. And they kept telling

11:20AM

15 us, "No, there's got to be this End User License
16 Agreement."

17 Well, before this hearing started -- and as I
18 explained to them -- we went to LG Korea because I wanted
19 to in come and make sure I had the dispute right, whether
20 we're saying we're not going to give you documents
21 because our parent has them or do our parents do not have
22 the documents. We do not have this document because it
23 doesn't exist.

11:20AM

24 But you know what? "We" being LG Korea and --
25 although LG Korea is not a party to this case, subject by

11:21AM

1 a reasonable disclaimer -- we don't have it. But how do
2 we know that's true?

3 Because in April -- March/April, eight or nine
4 months after the infringement contentions were served,
11:21AM 5 plaintiff finally decided to issue one third-party
6 subpoena. One. After months of this case, one. And
7 they issued it to Google. And the very first category
8 out of the box was "I want any and all agreements you've
9 got with LG." And do you know whether or not Google
11:21AM 10 produced that agreement? They did not because it does
11 not exist.

12 As a matter of fact, yesterday I figured out
13 this is the second time that Google has been subpoenaed
14 by MTel. In another case they have been subpoenaed.
11:21AM 15 Google was asked to produce this very document. So,
16 either Google, LG, and the entire world are lying or the
17 plaintiff is wrong.

18 Another reason I know I'm right is because we
19 had a call on Monday and Mr. Taylor was on it and I was
11:22AM 20 on it and Mr. Levy and we had done public searching --
21 Mr. Barrow. Excuse me -- and we had searched, like maybe
22 there's some reference to it. Maybe it's called by a
23 different name. Maybe there's something else out there.
24 And we were checking and checking and checking and
11:22AM 25 checking, and we couldn't find anything. And we told

1 Mr. Taylor, we said, "Look, we don't have this stuff.
2 Our parent doesn't have this stuff. Is there any other
3 name by which it would be called? Is there any other
4 name by which you might know of it? I mean, in all your
5 cases, of all your MTel cases -- you guys have sued
6 everybody carrier-wise and their mother -- has anybody
7 ever produced anything like this?" The answer was "no."

11:22AM

8 "Have you ever seen any document like this
9 with anyone?" "No."

11:22AM

10 The only End User License Agreements that
11 exist, sir, exist between the customers, the end user
12 customers, like LG and a customer, Google and a customer,
13 Apple and a customer. They don't exist between LG and
14 Google except for the Mobile Application Distributor
15 Agreement which we produced to them months ago.

11:22AM

16 So, your Honor, respectfully, not only should
17 this motion be denied on that grounds, it's unfortunate
18 that we're here arguing about it because we explained
19 this yet again on Monday, this being the same exact
20 motion that was promised to be withdrawn if for some
21 reason this issue could not be there.

11:23AM

22 Now turning to the technical documents. Next
23 slide, please.

24 As to all categories of technical documents,
25 we produced them, they're in the possession of other

11:23AM

1 wireless carriers, they're publicly available, or they
2 don't exist. I want to go through each category in turn.

3 We can go to the next slide.

4 Teardowns, repair guides, and similar -- this
11:23AM 5 is Category 1 of the November 21st letter, which is
6 Exhibit A in the motion. They want teardowns, repair
7 guides, and similar documents sufficient to show the
8 hardware components.

9 Your Honor, may I approach the bench very
11:23AM 10 briefly again?

11 THE COURT: Yes.

12 MR. GARDNER: Your Honor, I'm showing the
13 court one of the many, many, many, many technical
14 documents that has been produced in this case. It's
11:23AM 15 about 200-something pages. It's concerning just one of
16 the phones. Just one of the phones. We've given them,
17 to my knowledge -- every other phone they've accused,
18 we've given them the same document. That is replete with
19 wiring diagrams, circuit diagrams, every piece of
11:24AM 20 hardware -- pin diagrams, flowcharts. Everything in that
21 phone hardware-related is in that document. We have
22 given them every single one of them. Every single one of
23 them identifies the transceiver.

24 As a matter of fact, Mr. Barrow, can you show
11:24AM 25 that real quickly?

1 I'm sorry, your Honor.

2 Your Honor, for example, looking at the page
3 Bates stamped 054 at the end.

4 Go back up to the top.

11:24AM

5 This is the RF transmit/receive part. Now,
6 this is just one example that they listed in that
7 category, realizing there's 200 pages of stuff like this,
8 not just this. But it lists exactly the part numbers.
9 It says RF signal fed to the load noise amplifier RTR6500

11:24AM

10 LMA to the duplexer. Then that's fed to the mixer,
11 RTR6500. And in the RTR6500 the signal is changed
12 directly --

13 Excuse me. I'm sorry if I'm going too fast
14 for you.

15 THE REPORTER: A little.

16 MR. GARDNER: I apologize. I'll try to slow
17 down.

18 But it lists all the part numbers. This is
19 just for the -- this is their one parenthetical of what
20 they want. Well, we gave them much more than that.

11:25AM

21 If you can go to the next page.

22 Your Honor, you can see a flow diagram of
23 exactly what happens in that transceiver. We've -- they
24 can see everything. They can see all the parts. They
25 can see all the components. We've given them this.

11:25AM

1 Matter of fact, we've produced 82,000 pages of documents
2 to them.

3 I would ask Mr. Taylor to tell you what
4 exactly in these guides that we have produced they don't
5 have. They have everything they need as to hardware.

11:25AM

6 What Mr. Taylor told you when he was arguing
7 the Motion to Disqualify was, "Your Honor, this is about
8 Google iCloud. This is about unique, specific software
9 in Google iCloud. This case isn't really about

11:26AM

10 hardware." But nonetheless, we have complied fully with
11 that request; and we've given them everything we've got.

12 Next category, please.

13 THE COURT: I tell you what, Mr. Gardner. Let
14 me just make sure I understand what you're saying. You
15 have provided everything responsive that your client has.

11:26AM

16 MR. GARDNER: Yes, sir.

17 THE COURT: You have asked LG Korea and you
18 have produced what they have that's responsive?

19 MR. GARDNER: Yes, sir. It -- just to be
20 clear, though, I mean, they would have -- like this is
21 the -- what's the name? This is the service manual.
22 This is the same document that they would have. I mean,
23 essentially this is the hardware guide to the phone.

11:26AM

24 Now, I'm not saying there's not some other document
25 somewhere that describes the hardware of the phone; but

11:26AM

1 this is the document that describes the hardware in the
2 phone and how it works.

3 THE COURT: Okay.

4 MR. GARDNER: But specifically for purposes of
11:26AM 5 all the categories where they said, you know, we didn't
6 check with LG Korea, we have. And I really want to take
7 the court through each one of those.

8 THE COURT: Okay. And then tell me what your
9 position is regarding documents in the possession of the
11:27AM 10 third parties other than LG Korea.

11 MR. GARDNER: I'll tell you exactly. One,
12 respectfully, your Honor, it's not my job to conduct
13 third-party discovery. It's not my job. Respectfully,
14 it's not my job. But what we have done, we have gone
11:27AM 15 well above and beyond what we were supposed to do. Keep
16 in mind these folks have lawsuits pending against most of
17 these third-party folks. They've got their documents
18 anyway. But what they say to us now is, "Oh, by the way,
19 we need third-party stuff."

11:27AM 20 Our in-house counsel went to every single
21 one of the -- both the legal department and the business
22 side and said, "Hey, plaintiff is asking us for this
23 information. Can we please produce this information?"

24 And they said, "No. If plaintiff wants to
11:27AM 25 subpoena us, plaintiff can do that."

1 Plaintiff has not subpoenaed these folks.

2 THE COURT: So, what you're saying then is
3 that your client has responsive third-party documents but
4 is not permitted to produce those because of
5 nondisclosure agreements with those third parties?

11:28AM

6 MR. GARDNER: No, sir, I'm not saying that.
7 We have produced everything we have. The only things we
8 haven't produced that they want us to produce are for me
9 to go to Google's headquarters and demand that they
10 produce Google iCloud documents. That's the only thing
11 that we haven't produced to them.

11:28AM

12 THE COURT: All right. So, you've produced
13 everything you have; and the question then would be
14 whether you're under any legal obligation to produce or
15 to obtain documents from those third parties that you
16 don't currently possess.

11:28AM

17 MR. GARDNER: Yes, sir.

18 THE COURT: Is that right?

19 MR. GARDNER: Yes, sir.

11:28AM

20 THE COURT: Okay.

21 MR. GARDNER: And, respectfully, I mean, there
22 is no legal obligation; but we've done well more than
23 we -- we went way beyond, you know, what we were supposed
24 to do. We could have said, "Hey, jump off a bridge." We
25 didn't. We actually contacted them and said, "Plaintiff

11:28AM

1 wants these documents. Will you produce them."

2 And they said, "No."

3 THE COURT: Mr. Gardner, then I'm going to
4 interrupt you at this point and ask Mr. Taylor to respond
5 to what you've said thus far; and then I'll give you a
6 chance to go further if we need to.

7 MR. GARDNER: Thank you, sir. And please
8 forgive me for talking so fast and maybe loud, too. I'll
9 try to cut it out next time.

10 MR. TAYLOR: Thank you, your Honor.

11 I would like to first correct a few issues
12 that were raised during opposing counsel's last
13 presentation. Specifically when in December counsel for
14 LG informed counsel for MTel that the documents were in
15 the hands of third parties, counsel for MTel requested
16 documents showing the extent of control that LG had over
17 those third parties. These were not merely End User
18 License Agreements between end user customers but
19 specifically in each of the documents and correspondence
20 that counsel put on the screen, it says "and agreements
21 between LG and those third parties." Not just end users,
22 not just End User License Agreements. We sought those
23 documents. LG responded that they did not possess them,
24 they were in the possession of the third party. In order
25 to show that LG had the practical ability and the control

1 over those documents, we requested agreements between LG
2 and those third parties.

3 As time went on and promises that the
4 documents and the agreements were on their way were made,
11:30AM 5 at the Claim Construction Hearing we stated we would file
6 the Motion to Compel, as the deadline was quickly
7 approaching. LG, in response, promised to make a
8 production of documents; and we stated that if that
9 production resolved the issues, we would withdraw the
11:31AM 10 issue -- we would withdraw the motion. It was not merely
11 a placeholder report, but it was a report filed in the
12 face of continued promises that the documents were on
13 their way and not having seen them.

14 THE COURT: All right. I understand that.
11:31AM 15 And I -- what I'd like to know is: What evidence do you
16 have that LG has not produced to you all of the
17 responsive documents that are in their possession?

18 MR. TAYLOR: I would direct your Honor to the
19 deposition of LG's corporate representative, a
11:31AM 20 Mr. Nafei --

21 Excuse me if I'm mispronouncing that.

22 MR. LEVY: If I may, your Honor, it's Nafei
23 (pronouncing).

24 MR. TAYLOR: Thank you. Nafei (pronouncing).

11:31AM 25 -- a Mr. Nafei that is included in the folder

11:32AM

1 that I handed up. It occurred on April 2nd, 2015. And
2 these are just excerpts from that deposition. The
3 deposition is close to three to 400 pages, and these are
4 just some of the numerous examples wherein the witness
5 was able unable to answer on behalf of LGEMU -- or excuse
6 me -- stated that the information was not possessed by
7 LGEMU but he did not know if it was possessed by LG
8 Korea. There are instances where the witness -- on page
9 57, line -- starting at line 7, the witness was unaware
10 of what the GCM, Google Cloud Messaging application --
11 this is an application that is running on LG devices and
12 is responding to the Google Cloud service -- what GCM
13 even stood for.

11:32AM

11:32AM

14 THE COURT: Well, I guess what I'm looking for
15 is evidence that LG has not produced to you all of the
16 responsive documents that are in their possession. And
17 the fact that this witness may have said he didn't know
18 if LG Korea had it is not really what I'm after. Do --
19 and I know that -- I'm trying to take this point by
20 point.

11:33AM

21 Do you have any reason to believe that you
22 haven't gotten all of the documents that are in their
23 possession that are responsive to your request?

11:33AM

24 MR. TAYLOR: Within their physical possession,
25 no, your Honor.

1 THE COURT: Okay. Now, you've just heard what
2 Mr. Gardner had to say about responsive documents in the
3 possession of LG Korea. What evidence do you have that
4 LG Korea has responsive documents that you have not had
5 produced?

11:33AM

6 MR. TAYLOR: There is testimony -- I was
7 looking for the exact citation, and I cannot see it at
8 this moment. But there is testimony in the deposition of
9 Mr. Nafei -- sorry -- and that states that Google -- or
10 excuse me -- that LG employs engineers that write
11 software -- that write code and that LG Korea has that
12 information. LGEMU has not produced any source code, and
13 correspondence between the parties suggests that LGEMU
14 took the position that they did not possess it because it
15 was -- it belonged to LG Korea.

11:34AM

11:34AM

16 THE COURT: Okay. And tell me where that is
17 in your November letter. Which category would that fall
18 within?

19 MR. TAYLOR: Your Honor, I believe that falls
20 in -- under Category 2 and Category 3 which requests
21 protocol documents, state-flow diagrams, and/or
22 flowcharts showing the communication. These documents
23 will -- are often tied in connection with the source
24 code. State-flow diagrams and flowcharts specifically
25 are often used to describe the operation of the source

11:35AM

11:35AM

1 code.

2 THE COURT: Okay. But that's -- that doesn't
3 constitute a request for the source code. Is there a
4 request in here for source code?

11:35AM

5 MR. TAYLOR: No, your Honor, not in this
6 letter.

7 THE COURT: How is it at issue in this motion,
8 then?

11:36AM

9 MR. TAYLOR: The specific source code
10 production is not explicitly identified in this motion.
11 It is implicated through the request of other documents,
12 including identification of the --

13 THE COURT: Let's talk about what is at issue
14 in this motion.

11:36AM

15 MR. TAYLOR: Yes, your Honor.

16 THE COURT: So, is there anything that you can
17 point to that suggests that what Mr. Gardner said about
18 LG Korea is not accurate?

11:36AM

19 MR. TAYLOR: Your Honor, there is nothing that
20 we have that I can disprove -- or excuse me -- that can
21 prove a negative, that can prove that LG Korea, against
22 reason, does not have the information, that there -- we
23 know -- we have proof that LG Korea has source code. We
24 have proof that --

11:37AM

25 THE COURT: You haven't shown me that source

1 code relates to this motion.

2 MR. TAYLOR: Yes, your Honor.

3 THE COURT: So, what I want to hear about is
4 what relates to this motion.

11:37AM

5 MR. TAYLOR: Yes, your Honor. And excuse me
6 if I was not clear. The point I was trying to make is we
7 have proof that they do have source code. It stands to
8 reason that in every other case, every other software
9 defendant, every other software entity such as this, when

11:37AM

10 they have source code, they have documents describing the
11 source code. An engineer isn't going to just sit down
12 and start writing. They have design documents. They
13 have technical documents that describe the objectives
14 that the source code will meet. And those documents are
15 requested in Categories 2 and 3.

11:38AM

16 The -- although -- excuse me. The evidence
17 shows that they do have source code that has not been
18 produced. I understand that that is not explicitly
19 listed under this motion and is therefore not an issue in

11:38AM

20 this motion. The implicit understanding of that is that
21 these other documents exist. The unfortunate situation
22 is because we have not been able to depose anyone from LG
23 Korea or to talk with anyone from LG Korea and instead
24 only have the testimony of LGEMU's witness who simply

11:38AM

25 says, "I don't know what they have."

1 THE COURT: Why have you not deposed anyone
2 from LG Korea?

3 MR. TAYLOR: Because it is our understanding
4 that when the subsidiary has the practical ability to
11:38AM 5 obtain the documents, it was under their obligation to do
6 so.

7 THE COURT: Okay. Well, you just said you've
8 not been able to. Did you mean to say you have chosen
9 not to?

11:39AM 10 MR. TAYLOR: I meant to say that we -- by the
11 time this deposition occurred and we learned that LG
12 Korea did have these company -- did have these documents
13 but LGEMU's witness was unable to say what they did or
14 did not have, the discovery period had closed.

11:39AM 15 THE COURT: So, it's just -- it was something
16 that you did not accomplish during the discovery period.

17 MR. TAYLOR: Yes, your Honor.

18 THE COURT: Okay. Tell me why the flow
19 diagrams and -- flowcharts, state-flow diagrams, protocol
11:39AM 20 documents, why are they not covered in these various
21 manuals that you have been produced?

22 MR. TAYLOR: Yes, your Honor. Those manuals,
23 as counsel pointed out, go to the hardware. The claims
24 definitely implicate hardware to some extent. You have
11:40AM 25 various "means for" claims that implicate structure.

1 Hardware is structure. But those do not go to the
2 software -- the application which, as we discussed
3 earlier this morning, is at the heart of the accused
4 functionality.

11:40AM

5 THE COURT: All right. The software is not
6 what LG distributes in this country?

7 MR. TAYLOR: They distribute phones that
8 are -- that have the software installed on them.

9 THE COURT: Okay.

11:40AM

10 MR. TAYLOR: It is LG Korea that loads that
11 software onto the phones, presumably in Korea, although
12 that is a presumption.

13 THE COURT: And in the cases that you made
14 reference to before -- the cases that I'm familiar with
15 deal with the technical information about the devices
16 that the U.S. subsidiary sells. Have you seen cases --
17 can you point out to me cases that directly address the
18 software that resides on those devices and whether or not
19 the U.S. subsidiary has been found to have an obligation
20 to provide that as well?

11:41AM

21 MR. TAYLOR: There is nothing that comes to
22 mind, your Honor. However, it is MTel's position that
23 the devices that LG is selling in this country include
24 that software. They're not selling blank devices that
25 the customer has to then go load their software on.

11:42AM

1 They're selling and marketing the benefits of the
2 software on their devices.

3 THE COURT: Okay. So, you've talked about 2
4 and 3, then. Do you have any indication that there's
5 anything else that LG Korea has that's responsive to your
6 request and has not produced?

7 MR. TAYLOR: Your Honor, I would argue that
8 the same reasoning also applies to Category 4 which
9 specifically deals with the emoticons, including how the
10 files corresponding to the emoticons are stored. This is
11 also going to be implicated with the LG Korea installing
12 the software onto the device, where that file is stored
13 on the specific -- or the hardware on the specific LG
14 device.

15 Testimony in the deposition also implicates
16 Category 5. The deponent was asked how they choose
17 various features, and he stated that that was a function
18 of LG Korea and that as an LGEMU employee he did not
19 know.

20 Category 6, your Honor, is not at issue.

21 Category 7 is implicated as part of Categories
22 2 and 3. This is just a specific application of the
23 software, discussing how a very specific function
24 operates.

25 As well as 8 -- Category 8.

1 Categories 10 -- Category 9 is not at issue,
2 your Honor.

3 Categories 10, 11, 12 -- 10 through 12, these
4 were all categories of documents and information that the
5 witness -- the deponent was asked about during his
6 deposition and provided the same answer, that this is
7 functions of LG Korea and not of LGEMU. Now, whether
8 these are specific documents or if it is information
9 regarding the documents or information regarding the --

10 excuse me -- evidence regarding the information contained
11 within these documents, I'm not a hundred percent clear
12 on that. Whether, you know, they have a document
13 explicitly listing it or if LG Korea is in possession of
14 the information as to this document, I -- regardless,
15 LGEMU's witness was not able to provide any information
16 via testimony on this issue under the reasoning that it
17 was LG Korea's responsibility.

18 Now, Documents 13 and 14 are what I would just
19 call "litigation documents." It's not something
20 specifically that LG Korea would have, with the
21 understanding of an exception that if at trial LGEMU
22 plans to use a document that was in the possession of LG
23 Korea, then that document would fall under Categories 13
24 and 14.

25 THE COURT: All right. Now, talk to me about

1 documents that are in the possession of third parties
2 that are other than LG Korea. Why do you contend that LG
3 has an obligation to reach out to those parties and
4 gather documents?

11:45AM

5 MR. TAYLOR: Yes, your Honor. The case law on
6 this also uses the term "affiliate." And we believe that
7 through the practical day-to-day operations, testimony
8 from LGEMU's corporate representative shows that LG Korea
9 goes through LGEMU to facilitate communications between
10 LG Korea and Google.

11:46AM

11 THE COURT: I think that the word "affiliate"
12 as used in those cases is referring to some ownership
13 interest, not simply the fact that the companies do
14 business. You're using "affiliate" more in the broad
15 sense like Amazon uses it, that every -- all of their
16 trade partners are affiliates?

11:46AM

17 MR. TAYLOR: Understood, your Honor. As
18 counsel for LG pointed out, we do have a third-party
19 subpoena standing that once again also, unfortunately,
20 ran to the end of the originally noticed discovery
21 deadline. However, we did -- we were able to reach an
22 agreement with outside counsel for Google wherein if the
23 court reopened discovery, that Google would produce
24 additional documents.

11:47AM

11:47AM

25 THE COURT: All right.

1 MR. TAYLOR: Your Honor, another point is from
2 early on in this case we have been requesting the
3 agreements between LG, whether that's LG Korea or
4 LGEMU -- it's a little murky on exactly how they split it
5 up -- but agreements between LG and these third parties
6 that would enable MTel to demonstrate LG's control over
7 these third parties. And as your Honor pointed out, this
8 is an -- the level of control is a factor in determining
9 an obligation to produce documents. We have requested
10 the agreements that would show that level of control and
11 have yet to see those agreements.

12 I understand that it is LG's position that
13 those documents simply do not exist. I find that
14 incredulous to believe that a -- two major entities
15 responsible for millions of dollars' worth of profit do
16 not have any agreement between themselves, especially
17 when one entity is providing software that operates on
18 the hardware of another entity.

19 THE COURT: All right. I'm going to ask
20 Mr. Gardner to respond to the items from your November 21
21 letter that you maintain LG Korea should have, and I'll
22 get back to you.

23 MR. TAYLOR: Thank you, your Honor.

24 MR. GARDNER: Your Honor, I have much to say;
25 but if you want me to go through these categories, I'll

1 go over those categories first.

2 THE COURT: You can tell me first generally.
3 You've heard the discussion. Is it your position that
4 you have inquired of LG Korea about each of the things
5 that Mr. Taylor just talked about and that they have
6 advised you they don't have responsive documents?

7 MR. GARDNER: Yes, sir, but let me tell you
8 why. Let me tell you -- you don't just have to take my
9 word for it. I'll show you why that is true.

10 One thing that's important to note -- have you
11 seen that Beckham -- that David Beckham -- that
12 soccer-player guy commercial that plays? I think it was
13 the Super Bowl. He runs to like the Sprint store and he
14 wants a plan and he runs to the Verizon store. He goes
15 to all these different stores, like, "Hey, I want a plan"
16 or text messages or whatever. And he finally finds one
17 he likes. The one place he didn't go was an LG store,
18 and the reason for that is because LG doesn't operate a
19 network. The carriers operate networks. LG doesn't have
20 any network whatsoever. What LG does is assemble
21 hardware and sell a phone to T-Mobile, for instance, who
22 operates the network and then T-Mobile does whatever it
23 does as to the network. LG doesn't do anything as to the
24 network, has no networks, has never had a network, has no
25 control over the networks; and it would be preposterous

1 for T-Mobile to -- you know, for T-Mobile to just turn
2 over their cell networks to LG is preposterous.

3 But let me take each category in turn.

4 THE COURT: All right.

11:50AM

5 MR. GARDNER: If I can go to Category 2,
6 page -- Slide 22.

7 This "protocol documents" asks for diagrams
8 and flowcharts showing the communication between an
9 accused device and the relevant server. That is not us.

11:50AM

10 As Mr. Taylor said in the very beginning of this case,
11 this is about very unique software, such as Google
12 iCloud, that deals with how those devices -- how they
13 communicate with T-Mobile's network or somebody else's
14 network or somebody else's server. LG doesn't have

11:51AM

15 servers. Obviously they have their own internal like --
16 I assume like the court has a server or something
17 where -- that handles computers. We don't do that. We
18 don't have any of those. All we have are phones and
19 hardware that have -- you know, Android -- the Android

11:51AM

20 code is on those phones, and that's all publicly
21 available. You can go right now and download the whole
22 thing. All that code is there. There's also embedded
23 Qualcomm code and other third-party chip code that's in
24 the chips themselves that we don't have access to.

11:51AM

25 Obviously the third parties do. We don't have any of

1 these. LG Korea doesn't have any of these; LGEMU doesn't
2 have any of these. The people that do are Google, and
3 they subpoenaed Google.

11:51AM

4 And, respectfully, if they had come to me and
5 said, "Allen" -- they got what they needed, in my mind.
6 They got 8200 pages of documents -- 8,000 pages of
7 documents from Google. If they had come to me and said,
8 "Allen, you know, we just need a couple more weeks. We
9 want a few more documents from Google," by golly, I mean,
10 you can extend that discovery period in perpetuity for
11 that purpose.

11:52AM

12 However, they've already subpoenaed Google.
13 They've subpoenaed them twice. They got what they want
14 from Google. The reason they had to subpoena Google is
15 because this is all Google's stuff. It's T-Mobile's
16 stuff. It's not -- this is not our stuff. So, we don't
17 have --

11:52AM

18 THE COURT: Okay. Let's go on to 4, then.

19 MR. GARDNER: Excuse me, sir?

11:52AM

20 THE COURT: I understand your position on
21 that. Let's go on to Category 4.

22 MR. GARDNER: Yes, sir. Category 4. This is
23 even better. I am old-school to some extent because I
24 still use smiley faces. Now these emoticons and emojis
25 are everywhere. You can get thumbs-up, beer signs, music

11:52AM

1 signs. You can get whatever you want, a sign. I don't
2 have -- maybe I do. I don't know. But I use smiley
3 faces. We don't design emoticons. We don't design
4 emojis. We have nothing to do with that. That is
5 Google. Google has zillions of them. I'm sure Apple
6 probably has those; Samsung has some. We don't do that.
7 We don't design that.

8 THE COURT: What about 5?

9 MR. GARDNER: 5. Excuse me. That's the
10 same -- when it talks about the design documents of the
11 accused application, the accused application is the
12 network, how Google iCloud interfaces with the network,
13 how -- whether or not we had -- like if we had, for
14 instance, an LG mail system like Google -- like Google
15 has a G-mail system, if we had an LG mail system, how
16 that would interface. We don't have any of that. All of
17 that happens with third parties. Every ounce of it
18 happens with third parties.

19 THE COURT: All right. The letter defines
20 "Accused Applications." So, help me understand.

21 MR. GARDNER: Yes, sir.

22 THE COURT: That's under A on the first page
23 of the letter.

24 MR. GARDNER: Yes, sir.

25 THE COURT: There we go.

1 MR. GARDNER: Okay. The "'Accused
2 Applications' means the applications identified in MTel's
3 Infringement Contentions." I've got those.

4 LG E-mail Application, we don't have that,
11:54AM 5 your Honor. That's like G-mail. We don't have LG mail.

6 LG Browser Application. Mr. Taylor just said
7 for the first time that's not at issue. Well, it's not
8 been -- we've known all along it's not an issue because
9 we don't have an LG browser, but that's the first time
11:54AM 10 he's admitted as of today. We don't have control over
11 Google Cloud Messaging (GCM) and/or Windows Push
12 Notification Service. That is Microsoft.

13 THE COURT: Is the same true of the Calendar
14 Application and the Messaging Application?

11:55AM 15 MR. GARDNER: Yes, sir. Yes, sir. We don't
16 have -- there's no LG calendar. There's no LG mail. We
17 don't do that; and we've told them that, respectfully,
18 time and time and time again. Nonetheless, we have an
19 emergency motion that's seeking to extend numerous
11:55AM 20 deadlines in this case.

21 THE COURT: All right. I think Category 5
22 also deals with the accused applications.

23 MR. GARDNER: Category 7, sir?

24 THE COURT: 5.

11:55AM 25 MR. GARDNER: Yes, sir. And we just talked

1 about -- if you want to keep talking about it, we can.

2 THE COURT: No. I think we've covered 5 and
3 6, then.

4 MR. GARDNER: Yes, sir.

11:55AM

5 THE COURT: 7.

6 MR. GARDNER: 7, 8, 9.

7 THE COURT: 7 and 8 are both -- I think you've
8 already addressed those.

9 MR. GARDNER: Yes, sir.

11:55AM

10 THE COURT: And what about 10 through 12?

11 MR. GARDNER: We have produced license
12 agreements to them; and we have produced the Mobile
13 Application Distribution Agreement, which is the "MADA,"
14 with Google. That's actually between LG Korea and
15 Google; and what that says is, "If you're going to build
16 an Android phone, you got to do it this way. If you're
17 going to use Android -- you can't modify. Here's how you
18 got to do it." That's the agreement we have with Google.
19 That's the only agreement we have with Google.

11:56AM

20 We asked actually as of Monday -- I mean, I
21 don't know. Maybe it's a purchase order or something.
22 We asked as of Monday "Is there any other -- name of any
23 other type of agreement you want us to look for?"

24 And Mr. Taylor said, "I want any and all
25 agreements that deal with Google iCloud. If there's

11:56AM

1 anything regarding Google iCloud, I want to get that."

2 We went back yesterday again, LG Korea, "Do we
3 have any agreement with Google regarding Google iCloud or
4 anything like that?" And again they confirmed "no."

11:56AM

5 THE COURT: Okay.

6 MR. GARDNER: The agreement we have with
7 Google is the Mobile Application Distribution Agreement
8 which we have produced to them.

9 THE COURT: Tell me about 11 and 12.

11:56AM

10 MR. GARDNER: Yes, sir. We have produced
11 those. We have produced them. We have produced all
12 financial information to them. They've got the cost of
13 goods sold. They've got that. As a matter of fact, I
14 don't think this is at issue -- your Honor, that's not at
15 issue in the motion, to my knowledge, today; but we have
16 produced that to them.

11:57AM

17 THE COURT: Okay. All right. Thank you,
18 Mr. Gardner.

19 MR. GARDNER: Bills of materials, I can
20 clarify that's in the service manual; but I don't believe
21 those two issues were at issue today. That's why I
22 didn't have them on my slides.

11:57AM

23 But, your Honor, if I can, again, we have done
24 all we had to do and much, much more. And, your Honor,
25 it's not just about software. It's -- we cannot -- I

11:58AM

1 mean, they can issue a third-party subpoena. There are
2 hundreds of them issued daily in the Eastern District of
3 Texas. They can issue from this court, and it takes a
4 mere ten minutes. It's like why in the world if you
5 truly believe third parties -- you know, you know they're
6 implicated because they're in the infringement
7 contentions; and you can't even serve a third-party
8 subpoena. I've served hundreds of them, respectfully.

9 THE COURT: Thank you, Mr. Gardner.

10 MR. GARDNER: Yes, sir.

11 THE COURT: Mr. Dacus.

12 MR. DACUS: Your Honor, may I address this
13 cost of goods sold issue quickly?

14 THE COURT: Yes.

15 MR. DACUS: Because it's an issue that at
16 least I believe I'm familiar with. They may prove me
17 wrong. But I do not believe we have received the cost of
18 goods information. If you listen closely to what
19 Mr. Gardner said, he said, "We have produced all
20 financial information." So, what that really means is
21 they've given us some LGEMU financial statements which
22 contain a line item that says "cost of goods sold"; but
23 as the court is familiar with from other cases, that's
24 really just a transfer price from the Korean entity to
25 LGEMU. We don't have true cost of goods related to these

1 products that I'm aware of. If we have them, certainly
2 I'll accept LG pointing us to them.

3 THE COURT: Well, just while you're up there,
4 Mr. Dacus.

11:59AM

5 MR. DACUS: Yes, sir.

6 THE COURT: You've heard Mr. Gardner's
7 response on these. Is there anything else besides the
8 cost of goods sold that you think you can make a showing
9 that LG has not adequately produced?

11:59AM

10 MR. DACUS: The first thing that comes to
11 mind -- I may have to draw upon Mr. Taylor to help me
12 answer this question. But with respect to the category
13 that involves licenses, your Honor, I don't believe we
14 have licenses from the Korean entity and -- but testimony
15 is -- let's see -- from again Mr. Nafei, and I'm looking
16 on page 229 of his deposition. He said that that
17 information would reside at the Korean entity.

12:00PM

18 THE COURT: This request is worded in an
19 interesting fashion. It says "License agreements that LG
20 believes are applicable to the accused functions."

12:00PM

21 MR. DACUS: I've read it while the hearing is
22 ongoing, judge; and I'm not going to argue with you that
23 it could have been worded better.

24 THE COURT: Well, I mean, it sounds like it's
25 designed to prevent LG from later offering up other

12:00PM

1 licenses.

2 MR. DACUS: That's certainly one purpose.

3 THE COURT: But in any event, what am I to do
4 if LG says, "We have produced all the licenses we believe
5 are applicable to the accused functions? Which is what I
6 have heard from them.

7 MR. DACUS: Understood, your Honor, and far be
8 it from me to tell the court what to do but I do think an
9 order is appropriate ordering them to produce those; and
10 if the response to that order is there are none, then
11 that's the response. I find that hard to believe; but I
12 certainly don't have any proof to show to the court
13 today, from any witness or any testimony or any document,
14 that in fact LG Korea has those licenses. I don't have
15 that today.

16 THE COURT: Well, I guess the -- you know, the
17 request relates to the accused functions; and when I look
18 at the definition of "accused functions" on the first
19 page of the letter, those appear to be software functions
20 that would be covered by the argument Mr. Gardner just
21 made about the software coming from the -- whoever
22 they're selling the device to, T-Mobile or Google or
23 whatever.

24 Do you have anything that you can point me to
25 that would indicate that -- any reason I should believe

1 they have licenses for these accused functions?

2 MR. DACUS: I don't have any express evidence,
3 your Honor. That's -- I think, as Mr. Taylor said
4 earlier, reason sort of dictates that they would but I
5 certainly have heard them represent that they do not and
6 I do not have any direct evidence to point the court to
7 today.

8 THE COURT: Okay. Now, you have said that you
9 don't believe that you have received anything about the
10 cost of goods sold other than perhaps a line item on a
11 financial report.

12 MR. DACUS: That's my belief, your Honor.

13 THE COURT: Okay. Then I will ask Mr. Gardner
14 to respond to that.

15 MR. GARDNER: Your Honor, if you can look at
16 the screen, sir. We produced this document to them.
17 It's a massive spreadsheet. It's got COGS, fixed costs,
18 margins, market, service, R&D, SGB, headquarter, other,
19 operating income -- and again, I'm sorry. I took a
20 couple of accounting classes in college, and I'm not --

21 THE COURT: What is it broken down by? In
22 other words, is this by device or by what?

23 MR. GARDNER: Your Honor, may I let Mr. Levy
24 jump in just for a second and tell you a little bit more
25 about that?

1 THE COURT: Yes.

2 MR. LEVY: Your Honor, thank you. If I may.

3 Mr. Barrow, if you could scroll to the left.

4 Every device for every quarter -- you know,

12:03PM

5 you can see the LGUS740 is the model, you know, for Q4

6 November 2010. There's a model suffix which indicates,

7 you know, who this was sold to, that kind of thing; and

8 then -- and it goes for I think a few thousand lines

9 because each phone has, you know, many different colors

12:04PM

10 and -- and it's broken down that way, too. And then all

11 the variable costs are broken out, and all the fixed

12 costs are broken out.

13 THE COURT: Show me, for instance, as you

14 scroll across horizontally, what kind of information

12:04PM

15 you've got there.

16 MR. LEVY: Yes, your Honor. So, sales, gross

17 sales, sales productions.

18 Keep going.

19 I'm going to try to remember. So, all the Vs

12:04PM

20 are the variables. All the Fs are the fixed. So,

21 there's, of course, the variable costs; and then

22 there's -- there's marketing, royalties,

23 transportation -- I can't remember what that G&A is --

24 manufacturing. And then you go into fixed costs, and it

12:04PM

25 continues, cost of goods, royalty. A lot of the same

1 costs that would be variable have fixed components as
2 well. And headquarters, that's another fixed cost, I
3 believe.

12:04PM

4 It's -- and this was all covered in the
5 deposition of Dr. Nafei when they went through. They
6 asked quite a few questions about the spreadsheet. It's
7 a pretty comprehensive bit of financial information.

12:05PM

8 MR. GARDNER: Your Honor, if I can. What
9 plaintiff told you a second ago is that we don't have any
10 information about COGS except a line item on like a SEC
11 statement or something. We've given them tremendous
12 amounts of detail. And, I mean, I didn't even, frankly,
13 know that this was necessarily going to be an issue today
14 because I think the Motion to Compel concerned technical
15 documents and the EULAs. However, we have given them
16 these things; and they have these things.

12:05PM

17 And I know -- Mr. Dacus is a good friend of
18 mine, a great guy. I know he doesn't know all about the
19 financial details, as do I not; but the court can see
20 that there is a tremendous amount of details in terms of
21 each phone, each cost, fixed costs, variable costs.
22 There -- you know, there shouldn't be any issue in this
23 case about the level of financial detail.

12:05PM

24 THE COURT: All right.

12:05PM

25 MR. DACUS: Your Honor, may I address that?

1 THE COURT: You may, Mr. Dacus.

2 MR. DACUS: The issue here is not that they
3 gave us a bunch of line items or a bunch of columns. The
4 issue is what are those numbers based on. Are they based
5 on the true cost, or are they based on a transfer price
6 from the Korean entity to the LGEMU subsidiary? That's
7 really the issue.

8 I understand that the 30(b)(6) witness was
9 unable to tell us that. What we've heard from LG
10 consistently throughout this case is that they were
11 unable to get information from the Korean parent. So,
12 our assumption has been and continues to be today that
13 the numbers they have given us are not the true cost
14 numbers but, rather, numbers based on the transfer

15 pricing. And as the court knows, that's an issue in
16 damages, what's the true amount of profit that these
17 folks are making on these products. So, that's the
18 issue, not did they give us a spreadsheet with a bunch of
19 line items. They certainly did but --

20 THE COURT: Well, so, you know, you've got a
21 very broad request which is just documents showing the
22 cost of goods for the accused devices.

23 MR. DACUS: Yes, your Honor.

24 THE COURT: I mean, obviously that's going to
25 call for a lot of judgment as to what responds. I mean,

1 I don't think you're asking for every document that
2 relates to something they purchase in the manufacturing
3 process.

4 MR. DACUS: Not at all.

12:07PM

5 THE COURT: So, why isn't this spreadsheet a
6 reasonable response to that request?

12:07PM

7 MR. DACUS: Because, your Honor -- let's just
8 take the "cost of goods sold" category. In sort of
9 accounting parlance and common terms, that is what's the
10 material and labor that went into this product, right,
11 for just -- speaking in lay language. Our understanding
12 is -- and certainly LG can represent if it's otherwise --
13 this is not necessarily the actual cost of material and
14 labor that went into the product. This is, in contrast,
15 a transfer price, meaning a price that LG Korea charged
16 to the LGEMU entity. We believe we're entitled to know
17 the true cost of goods sold, that meaning the actual
18 expenditure either by the Korean entity or another LG
19 affiliate.

12:08PM

12:08PM

20 THE COURT: Well, I think that what they've
21 produced here is a reasonable response to a very broad
22 request; and if you have a more specific request, then I
23 think it's incumbent on you to communicate that and give
24 them an opportunity to respond.

12:08PM

25 MR. DACUS: Understood, your Honor.

12:09PM

1 THE COURT: I don't think that it would be
2 appropriate for me to simply say "produce all documents"
3 on a category that broad; and, so, I guess, Mr. Dacus,
4 I'm in a position where I don't think I'm able to grant
5 you the relief that you're after.

12:09PM

6 MR. DACUS: Your Honor, could I potentially
7 modify the request -- I think what I'm about to suggest
8 is subsumed within the request -- that they identify not
9 all documents but, rather, as they have done in this
10 spreadsheet, the actual cost of goods sold for each
11 product that they've identified in the spreadsheet that
12 they've shown to the court, rather than the cost of goods
13 sold element based on a transfer price?

12:09PM

14 THE COURT: And what would that document be?
15 For instance, these are different models, I guess, of
16 these phones. What document would they have that would
17 show what you're calling the "actual cost of goods sold"
18 for a particular model?

12:09PM

19 MR. DACUS: I cannot identify the document by
20 name, your Honor; but I'm confident that they have that
21 type of document. In fact, if they gave us the
22 spreadsheet that they've shown to the court today and
23 just inserted in the "cost of goods sold" column the
24 actual cost of goods sold rather than cost based on the
25 transfer price, that would be adequate to satisfy what we

12:10PM

1 need.

2 THE COURT: Can you identify for me what you
3 have received from other manufacturing defendants on this
4 issue?

12:10PM

5 MR. DACUS: I think it's come in in differing
6 forms, your Honor. There are certainly manufacturers who
7 keep it in this fashion, where they track their costs by
8 model; and they've provided a spreadsheet in that regard.
9 I think there are others who, you know, don't necessarily

12:10PM

10 keep it in a spreadsheet or *Excel* format like this but
11 just track it on a product-by-product basis individually
12 and then provided it on a product-by-product basis.

12:11PM

13 Maybe I'm not doing a good job of explaining, but it
14 certainly -- it would be beyond incredulous if someone
15 within the LG family, be it Korea or otherwise, did not
16 track the amount of costs that go into making one of
17 these products or phones.

12:11PM

18 THE COURT: Well, do you have any evidence
19 that the number they've given you is not the actual cost
20 of goods sold?

21 MR. DACUS: The evidence that I have is what
22 they've told us all along, is that they do not have
23 access to information from LG Korea. I know they've said
24 things a little differently today and as of Monday.

12:11PM

25 THE COURT: Well, has anybody said that what

1 is shown on this spreadsheet is just the transfer cost?

2 MR. DACUS: Not that I'm aware of, your Honor.
3 Mr. Nafei is the corporate representative who spoke on
4 this; and he was unable to answer that question, is my
12:12PM 5 recollection. I don't have his deposition testimony in
6 front of me, but I don't remember that he was able to
7 answer that specific question as to whether it was an
8 actual cost or a transfer cost.

9 THE COURT: All right.

12:12PM 10 MR. DACUS: He did generally say in that
11 deposition that that type of information was maintained
12 by the LG Korea entity, the type of financial information
13 that we sought.

14 THE COURT: Well, I'm sure that he would say
12:12PM 15 that the backup for all of these numbers resides with LG
16 Korea.

17 MR. DACUS: Correct.

18 THE COURT: But I don't think that that
19 necessarily means that these are transfer costs and not
12:12PM 20 actual costs.

21 MR. DACUS: I cannot argue with you on that
22 point, your Honor.

23 THE COURT: Okay.

24 MR. DACUS: Other than what we've generally,
12:12PM 25 you know, been told throughout the course of the case,

1 that LGEMU is a separate entity, "We don't have access to
2 the LG Korea information." And I think the logical
3 deduction from that is there's certainly a transfer price
4 from the Korean entity to the U.S. entity.

12:13PM

5 THE COURT: Now, all of this really relates,
6 in terms of your interest in it, to what your damages
7 expert would figure out in trying to apportion a
8 reasonable royalty to the -- your patented
9 functionalities, right?

12:13PM

10 MR. DACUS: With respect to this issue, that's
11 correct, your Honor.

12 THE COURT: I certainly think that your expert
13 can work with this information to come up with an
14 opinion, and I -- not having any further indication that
15 what you have been provided is not what it purports to
16 be, being the cost of goods sold, I'm not going to grant
17 any further relief on that.

12:13PM

18 MR. DACUS: Understood, your Honor. Thank
19 you.

12:14PM

20 THE COURT: All right. I want to, over the
21 break --

22 MR. LEVY: Your Honor?

23 THE COURT: Yes.

24 MR. LEVY: If I may, just one very small
25 point.

12:14PM

1 THE COURT: All right, Mr. Levy.

2 MR. LEVY: Referring to these as transfer
3 prices -- we just took a quick look at the deposition
4 transcript where Dr. Nafei was questioned about this, and
5 he pretty expressly says that this isn't the transfer
6 price. He's asked where is the transfer price on here.
7 He says it's not on here. These are the costs.

8 THE COURT: Okay.

9 MR. GARDNER: Your Honor, can I say one thing,
10 too, for the record?

11 THE COURT: All right.

12 MR. GARDNER: I am familiar with this court's
13 practice. This is the very first time that we have heard
14 this issue today, and the reason -- that's the reason
15 it's not in my slide show. We produced this like months
16 ago. They -- not once did they say, "Wait a second, you
17 know" -- and bless our heart, Mr. Dacus is a good lawyer;
18 but he is trying to save the -- I don't know, judge --
19 trying to get some victory out of the jaws of defeat.

20 The fact of the matter is that they have had
21 this; and if they had ever said anything -- they have,
22 respectfully, sat on their hands; and today they are
23 trying to salvage something to get you to order something
24 of an entity that's not in this case.

25 We have complied with our obligations. We've

1 done what we had to do. We gave them the information
2 they requested. I was in a hearing three weeks ago, and
3 I'm trying to -- I struggle with what it was. But
4 clearly if the plaintiff knows they have something, they
5 have a duty to say, "Hey, wait a second. I need more" or
6 "I don't have this" or "I've got to go to third parties
7 for discovery." They've got an onus. They can't put it
8 all on me.

9 THE COURT: All right.

10 MR. GARDNER: Yes, sir. Thank you. Forgive
11 me.

12 THE COURT: Thank you, Mr. Gardner.

13 What I'm going to do is ask counsel during the
14 lunch break to -- in addition to eating, to confer about
15 the calendar and at least come up with positions; and
16 after lunch I want to hear from both sides what your
17 positions are about what the court should do with the
18 DCO.

19 I've indicated to you that I'm going to extend
20 the trial for whatever time is minimally necessary for
21 the plaintiff to get another expert; and if, you know,
22 either side wants to -- you know, if you can reach an
23 agreement on that, great. If not, I at least want to
24 know what the positions of the parties are.

25 MR. GARDNER: Please forgive me, sir. Excuse

1 me for standing up. But is the court going to deny the
2 motion? Because that would help us in understanding what
3 we -- I'm not trying to get a ruling. I'm just -- I want
4 to make sure we understand what we're negotiating about.

12:16PM

5 THE COURT: My tendency at this point is to
6 say yes I'm going to deny the motion, but I want to think
7 further about it and look at it over the break. But I
8 would say that's certainly where I am leaning at this
9 point.

12:17PM

10 MR. GARDNER: Thank you, your Honor. I'm
11 sorry for standing up so much and for talking so fast.

12 THE COURT: All right. So, we'll come back
13 and take up the rest after lunch. We'll be back at 1:15.
14 Thank you.

12:17PM

15 (Recess, 12:17 p.m. to 1:37 p.m.)

16 (OPEN COURT, ALL PARTIES PRESENT.)

17 THE COURT: I understand that counsel have
18 reached some agreements during the recess.

19 Mr. Dacus?

01:37PM

20 MR. DACUS: We have, your Honor, at least some
21 to propose to the court for the court's consideration.

22 THE COURT: Okay.

23 MR. DACUS: What we propose as far as the
24 schedule going forward, given the court's ruling in

01:37PM

25 striking Dr. Bims, is that MTel would submit a new name

01:38PM

1 of an expert within 30 days from today; and then LG would
2 have 7 days to object to that expert -- object or not
3 object, I guess. 45 days from that day, assuming LG
4 agrees to the expert, we -- MTel would submit its
5 infringement report from the new expert.

01:38PM

6 In addition, your Honor, we would need to
7 submit a supplemental damages report for the purpose of
8 our damages expert -- there are references in his report
9 to Dr. Bims and his reliance on Dr. Bims; so, he would
10 now need to say that he is relying on the new expert,
11 whatever conversations he had with him.

12 THE COURT: Would that occur within that same
13 45 days?

14 MR. DACUS: It would, your Honor, yes.

01:38PM

15 And then 30 days from submission of MTel's
16 expert report, LG would submit its rebuttal report. And
17 I presume that could be on both infringement and damages
18 if they -- there may not be a need for a damages report,
19 but to the extent there is.

01:39PM

20 MR. LEVY: I'm sorry, your Honor. May I just
21 clarify? I was taking notes.

22 How many days did you just say?

23 THE COURT: 30 is what he said, after their
24 report, for your rebuttal report.

01:39PM

25 MR. LEVY: Thank you, your Honor.

1 THE COURT: All right.

2 MR. DACUS: And then our final proposal, your
3 Honor, is that we would have a trial date in February,
4 subject to the court's schedule. If we could get on the
5 February --

01:39PM

6 THE COURT: The February jury selection date
7 for Judge Gilstrap is the 8th, February the 8th.

8 MR. DACUS: We don't have any objection to
9 that.

01:39PM

10 THE COURT: Okay.

11 MR. DACUS: And I believe that's the entirety
12 of our proposal. We would need to work out some interim
13 dates for pretrial disclosures and those kinds of things,
14 the standard sorts of things that go along. I'm
15 confident we can do that. If the court gives us a
16 February 8th trial date, we can submit a more
17 comprehensive docket control order that includes all the
18 interim dates, if that's agreeable with the court.

01:40PM

19 THE COURT: All right.

01:40PM

20 MR. DACUS: And then one other thing to add is
21 with respect to the pretrial dates that are currently
22 pending and occurring even as we sit here, we would ask
23 that the court stay those pretrial deadlines because we
24 think it would be unnecessary and inefficient to complete
25 those at this point in time.

01:40PM

1 THE COURT: All right. I would be willing to
2 stay them for a period of -- I don't know -- seven days,
3 whatever, for the parties to submit a new proposed DCO.

4 MR. DACUS: Yes, sir, we'd be happy to.

01:40PM

5 THE COURT: Is that enough time?

6 MR. DACUS: Yes, sir.

7 THE COURT: You can also, if you want, call
8 Ms. Andrews and she can give you a pretrial conference
9 date to fit into that proposed DCO you're talking about.

01:41PM

10 MR. DACUS: We will do that, your Honor.

11 THE COURT: We'll go with the February 8 jury
12 selection before Judge Gilstrap.

13 All right. Have there been any agreements on
14 the other motions that are pending?

01:41PM

15 MR. DACUS: The other motion that I am aware
16 of that's pending is the Motion to Strike the
17 supplemental report.

18 THE COURT: Uh-huh.

01:41PM

19 MR. DACUS: And I'll do my best to describe it
20 and ask for LG's help. The supplemental report
21 essentially contains opinions related to the '946 patent
22 and the '506 patent. My understanding is that we have
23 agreement that LG will not -- or will withdraw its motion
24 to the extent it relates to the '946 patent but maintains
25 its motion with respect to the '506 patent.

01:42PM

1 THE COURT: Okay.

2 MR. DACUS: From MTel's perspective with
3 respect to that, we need to and plan to consult with our
4 client as to whether or not we will continue to assert
01:42PM 5 the '506 patent, given some of the court's rulings today;
6 and it may -- obviously if we're not going to continue
7 prosecuting the '506 patent, that will moot the remainder
8 of that motion. And if we don't withdraw it, then I
9 presume LG would want to continue to prosecute that
01:42PM 10 motion. So, what we would ask the court to do today is
11 just pass on that motion.

12 THE COURT: For how long? I guess what I want
13 is a date by which you will indicate your client's
14 decision on that.

01:43PM 15 MR. DACUS: Understood, your Honor. 14 days.

16 THE COURT: And I promise to give the
17 defendant a chance to be heard on this entire scheme.

18 Okay. Any other component of this agreement,
19 Mr. Dacus, from your side?

01:43PM 20 MR. DACUS: None that I am aware of, your
21 Honor. Thank you very much.

22 THE COURT: Okay. Mr. Gardner.

23 MR. GARDNER: Yes, sir. Your Honor, Allen
24 Gardner for Defendant LG. And I'll defer to my folks if
01:43PM 25 I misstate something.

1 I do want to make it abundantly clear. One,
2 we had made this agreement assuming the court has denied
3 the Motion to Compel.

4 THE COURT: And I do intend to do that.

01:44PM

5 MR. GARDNER: Secondly, sir, I want to make --
6 we've had a bunch of talks over the lunch hour. This
7 agreement to allow the substitute infringement expert
8 does not change the underlying scope or theories in the
9 case.

01:44PM

10 THE COURT: Well, and let me just help you on
11 one regard. It's not by agreement that the substituted
12 expert is coming in. I am --

13 MR. GARDNER: Yes, sir.

01:44PM

14 THE COURT: -- allowing them. So, you don't
15 have to take that bullet for your client. That's coming
16 from me.

17 MR. GARDNER: Appreciate it, sir. I don't
18 want any bullets for my client. I get enough of those
19 already.

01:44PM

20 Yes, sir. Subject to the court's ruling,
21 we -- what my fear is -- I'll put this on the record -- I
22 don't want to be six months from now with an infringement
23 expert who changes dramatically the scope or theories of
24 the case because then it totally changes everything. I
25 mean, this deal that we're talking about in terms of

01:45PM

1 trial date operates on the assumption that the case --
2 the scope and theories of the case remain the same.

3 And concerning the damages expert, you know,
4 what we've talked about, my envisioning of any new
01:45PM 5 damages expert report would essentially substitute out
6 Dr. Bims for new person's name. Obviously they need to
7 consult with that person. I just -- I do not want to see
8 a massive or even a minor theory or scope change in this
9 case or else, respectfully, we'll be right back here six
01:45PM 10 months from now having another big discussion. So, I
11 think we've talked extensively about that. I want to
12 make sure that that's agreeable with them as well.

13 Also, as to the '506 patent issue, I think our
14 agreement is if they drop the '506 patent, we will not
01:45PM 15 continue to challenge the supplemental report on the
16 basis of timeliness or whatever as to the '946 patent.
17 Obviously substantively we disagree with it; but assuming
18 they drop the '506 patent, we're not --

19 THE COURT: Okay.

01:46PM 20 MR. GARDNER: Mr. Beaber, if you want to
21 clarify.

22 MR. BEABER: I would just add they don't have
23 a current damages report on any patent other than the
24 '946. So, we've asked opposing counsel to confirm that
01:46PM 25 they would drop those two patents as a result of your

01:46PM

1 Honor's ruling on the Motion to Compel. I understand
2 that they can't give us a response on that today because
3 they have to consult with their client. So, what we
4 proposed was to delay any ruling on the Motion to Strike
5 until they get a response from their client which will
6 hopefully moot anything dealing with that patent, because
7 we would agree to the scope of the '946 supplementation
8 if that were the case.

01:46PM

9 THE COURT: Okay. Thank you.

10 MR. GARDNER: Your Honor, I'd just ask
11 Mr. Dacus to confirm at least my scope and theory
12 viewpoint. I think it's agreeable. I just want to make
13 sure we're all in agreement on that.

01:47PM

14 THE COURT: And, Mr. Dacus, I certainly expect
15 that the scope of the new infringement expert report will
16 not change. That's a broad definition and I guess we'll
17 just have to see, but that -- certainly I'm going to
18 operate from that premise, that it's not going to enlarge
19 the scope of the case.

01:47PM

20 MR. DACUS: Understood, your Honor.

21 THE COURT: And do you agree also with the
22 understanding that the defendant's withdrawal of their
23 Motion to Strike on the '946 is contingent upon your
24 client's decision to drop the '506?

01:47PM

25 MR. DACUS: I understand that now, your Honor.

1 THE COURT: Okay. Then that -- all right.
2 Well, I'll try to reflect these outcomes in the order;
3 and I'll expect that within the next seven days we'll get
4 a proposed DCO for a February 8 trial date.

01:48PM

5 Anything else we need to take up on your
6 motions, Mr. Gardner?

7 MR. GARDNER: No, sir. Thank you so much for
8 your time; and thank you for working with us on
9 scheduling, sir.

01:48PM

10 THE COURT: Okay. Mr. Dacus?

11 MR. DACUS: Nothing from the plaintiff, your
12 Honor.

13 THE COURT: All right. Thank you. We're
14 adjourned.

01:48PM

15 (Proceedings adjourned, 1:48 p.m.)
16
17

18 COURT REPORTER'S CERTIFICATION

19 I HEREBY CERTIFY THAT ON THIS DATE, JULY 28,
20 2013, THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE
21 RECORD OF PROCEEDINGS.
22
23

24 /s/
25 TONYA JACKSON, RPR-CRR